TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 458.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK, PLAINTIFF IN ERROR,

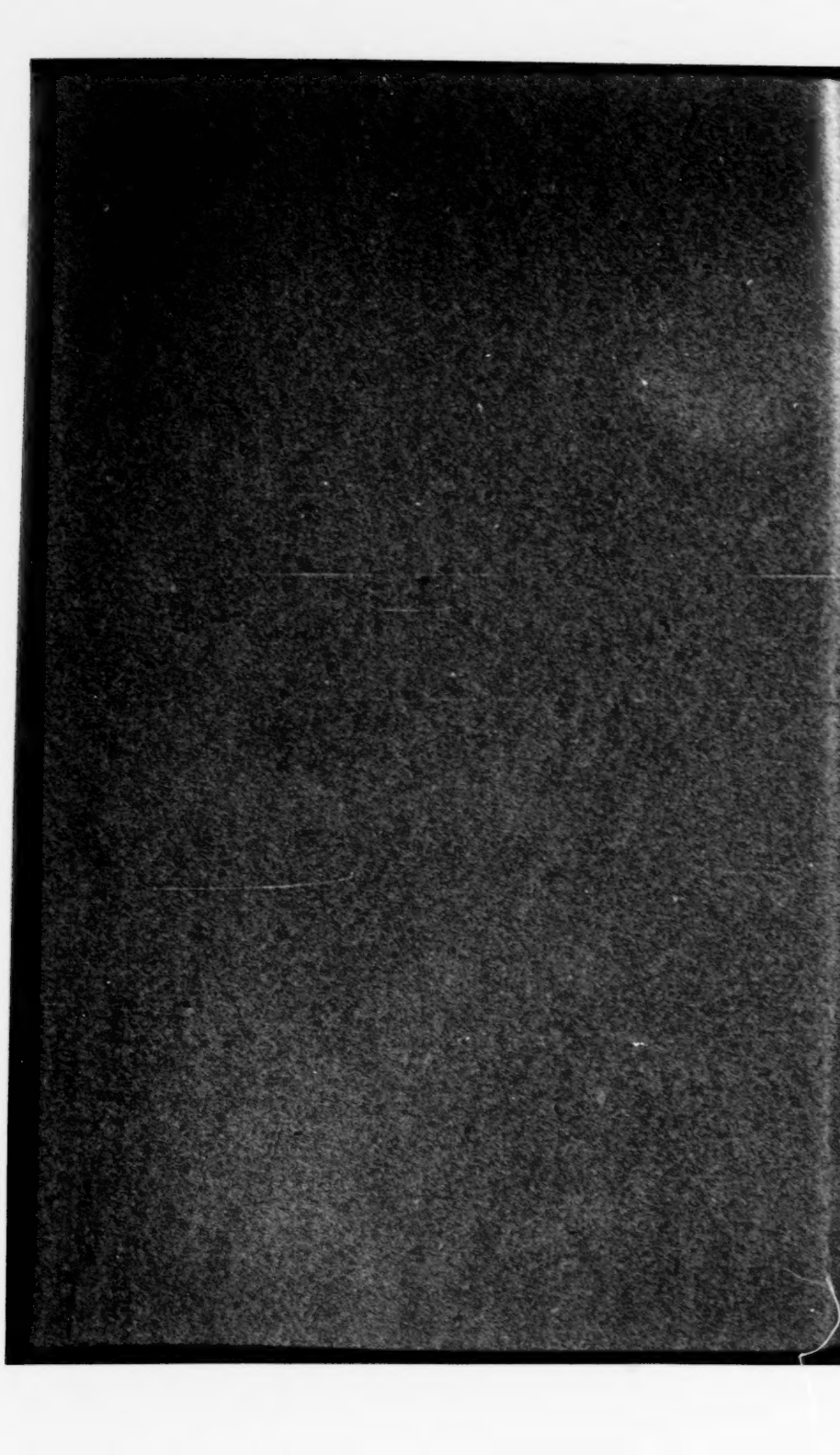
vs.

FRANK V. BRAHAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED NOVEMBER 28, 1903.

(18,733.)



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(18,733.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 505.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK, PLAINTIFF IN ERROR,

vs.

FRANK V. BRAHAN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

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1 Supreme Court of Mississippi, March Term, A. D. 1902.

Pleas and proceedings had and done at a regular term of the supreme court of Mississippi, begun and held in the court-room, in the capitol, in the city of Jackson, on the first Monday, the 3rd day, of March, A. D. 1902.

Present: The Honorable Albert H. Whitfield, chief justice, and the Honorable S. S. Calhoon and the Honorable S. H. Terral, associate justices; E. W. Brown, clerk of said court, in person and by W. J. Brown, Jr., his deputy; C. C. Campbell, marshal, and Thomas Grant, porter.

Among other cases considered and determined by said supreme court, was the following, to-wit:

2 STATE OF MISSISSIPPI, }
Lauderdale County. }

Be it remembered that a regular term of the honorable the circuit court of Lauderdale county, State of Mississippi, was begun and held at the court house in the city of Meridian, in said county and State on the first Monday in October, being the 7th day of October, 1901, and being the time and place provided by law for the holding of said court.

There were present the Hon. G. Q. Hall, judge of the 10th judicial circuit court district of the State of Mississippi, sole and presiding. Hon. J. H. Currie, district attorney of said 10th district, prosecuting pleas for the State.

R. H. Jemison, Esq., sheriff of Lauderdale county, State of Miss. John L. Barton official stenographer of said court and W. D. Cameron clerk of this court.

Among other causes called and tried on the 22nd day of October, 1901, was the case of F. V. Brahan *versus* The National Mutual Building & Loan Association of New York, which is in the words and figures following, to-wit:

THE STATE OF MISSISSIPPI, }
Lauderdale County. }

In Circuit Court, to July Term, 1899.

F. V. BRAHAN, Plaintiff,
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW York, Defendant.

F. V. Brahan, plaintiff by attorney, complains of The National Mutual Building & Loan Association—a corporation under the laws of the State of New York—defendant, which has been attached, in an action of debt. For that whereas on the — day of —— 1892, the

said defendant was engaged in lending money in the State of Mississippi, Lauderdale county, and had a branch office and an agent in the city of Meridian in said county and State, defendant was not a building & loan association in fact, but a mere money lender, but it had no domicile in this State, and never has been domiciled in this State, and never has been domiciled in said State, at any
3 time.

Plaintiff alleges, that by the charter of the said defendant, corporation, every borrower must take at least one share of $100. maturity value in stock, for each $100. he borrows; that no person can borrow money of said corporation until he pays or deposits $10. as an initiation fee, and subscribes for at least one share of stock, as aforesaid, for each $100. he borrows, and pay for an abstract of the title of his land, upon which it will not lend a sum in excess of sixty per centum, of the cash value of said land, on which, he must give a mortgage or deed of trust to secure said corporation the said loan, and he must agree to pay dues of 60 cents per share on each share of his stock, and pay a premium of 50 cents per share on each share of said stock, which in every case is fixed by the charter and by laws of said corporation, and not by open bidding and is fixed at six per cent., and also to pay, what is called, interest at six per cent. per annum on said loan, all of which, payments, must be made on or before the last business day of each month, or be in default for a period of 8 years, or until the maturity of the pledged shares, should they mature before the expiration of the said 8 years—the premium for the first six months to be paid in advance—and as additional security for the loan, he must transfer to the corporation said shares of stock, and agree to keep, the property, secured by insurance, in favor of said corporation.

Plaintiff further alleges, that he applied to the agent of said corporation, at Meridian, Lauderdale county, Mississippi, where said agent now resides, to borrow the sum of $2500.00, and it was loaned him on the terms aforesaid, by his subscribing for 25 shares of said common stock, and by paying the initiation fee and cost of abstract of his lands, and executing and delivering to defendant, corporation, a mortgage of date, May 21/92, in which, plaintiff's contract for said loan with defendant is fully set out, which mortgage, is recorded in Deed Book 28 p. 221 *et seq.* of the records of deeds, &c. in the chancery clerk's office of said county, and reference to the same is hereby made, and plaintiff alleges, that he begun paying thereon first on — day of May, 1892, as will more fully appear by reference to a bill of particulars herewith filed marked "Exhibit A" and made a part hereof.

4 Plaintiff further alleges, that it was agreed and understood between himself and said corporation, that said contract was made in this State, and was to be performed in this State, by plaintiff paying all his payments, agreed by him, to be paid, to the agent of defendant, corporation, at Meridian in this State, and all the payments made on said loan, were made to said agent at Meridian, in this State, and said agent had authority from said corporation to receive and receipt for the same, but that, the mortgage provides, that

the said sum so loaned, with interest, premium, and dues were to be paid to the said association at its office in the city of New York, which was so written by defendant with the intention, fraudulently, to evade the usury laws, of the State of Mississippi.

Plaintiff alleges, that he paid to the said defendant, corporation, from and including the said — day of May, 1892, up to and including August, 1894 in *dues, premiums* and *interest* the sum of $924.75 and in addition, to said sum, he further paid to said defendant the sum of $2611.00, on the 7th day of Nov./93, on account, of the said loan, of twenty-five hundred dollars, made to him in May/92. That in Sept. 1893, plaintiff's residence in the city of Meridian, against which the said loan was outstanding, was wholly destroyed by fire, and on said Nov. 7/93 he used all of the insurance money collected by him, with other funds aggregating $2611.00 and paid off said indebtedness, retaining the 25 shares of stock and their value in his own right, and he continued to pay the monthly dues until Aug. 1894 on said stock, which added to the amounts of dues, premiums and interest paid monthly, on said loan, from May/92 until Aug./94 aggregates said sum of $924.75, and which amount, plus the sum of $2611.00 gives the total amount paid on account of said loan by him, to said corporation, and shows an excess in payments on that loan, of the amount actually loaned him, to be the sum of $1035.75.

Plaintiff further alleges that on the 30th day of August, 1894, he again applied to the agent of said corporation at Meridian, in said county and State, where said agent now resides, for another and second loan, in the sum of $2000.00 with which to rebuild himself and family a home, on the same real estate, as that previously mortgaged to said defendant, and it was loaned him on the same terms aforesaid, by his subscribing for 20 shares, or in other words, by his pledging his 20 shares of said common stock, and by paying the initiation fee, and cost of abstract of his lands, and executing and delivering to defendant, corporation, a mortgage, of date Aug. 30/94, in which plaintiff's contract for said loan is fully set out, which mortgage is recorded in Deed Book 36, page 319, *et seq.* of the records of deeds &c. in the chancery clerk's office, of said county, and reference to the same is hereby made, and plaintiff alleges, that he begun paying thereon, first in Sept./94, the sum of $32. in dues, premiums and interest, and he so continued to pay on each, and every month, thereafter until March, 1897, making 31 months in all, aggregating the sum of $992.00, which plus six months' interest paid in advance $72.00 = $1064.00 and which, together, with the then value of his shares of stock, as reported to him by defendant, amounting to $649.70, and the further sum of $1473.96, making a grand total of $3187.66, which amount he paid to said defendant, in said March, 1897, in satisfaction, and payment of said second loan, and shows an excess in payments on that loan, of the amount actually loaned him, to be the sum of $1187.66.

Plaintiff further alleges, that both of said loans, so entered into with him, on the dates aforesaid, were usurious contracts, and are evidenced by the said mortgages aforesaid, and were willful violations of the statute against usury, and that the whole scheme of de-

fendant of requiring borrowers to take stock and pay pretended dues thereon, and premiums, and interest as aforesaid was a mere scheme of defendant's to evade the usury laws of Mississippi, because of charging a fixed premium and the taking of six per cent. interest, and six per cent. premium, payable monthly, through the whole periods, the loans were to run, and because the defendant purposed to and did take a greater rate of interest, for money loaned, than ten per cent. the maximum, fixed by law, of this State, wherefore plaintiff alleges, that he is entitled, under the law, to have and recover back, from the said defendant, corporation, the said sums of $1035.75 and $1187.66, aggregating $2223.41 with interest at 6% per annum, from date of payments to date of judgment—by him paid it, on said usurious contracts, above said debts; and which amount, the said defendant is indebted to, and has become liable to pay to him, or his order. And being so indebted, the said defendant has
6 wholly failed, and refused to pay said sum to plaintiff or any part thereof—and still fails and refuses so to do, to plaintiff's great damage, twenty-five hundred dollars, whereof he sues and demands judgment for said sum with interest and costs of suit.

F. V. BRAHAN, *Pro Se.*

"EXHIBIT A."

Bill of Particulars.

F. V. Brahan to said Association, D.

May 21/92.	To amount of first loan Deed Book 28, p. 221		$2500.00
	CREDITS.		
"	Six months premium paid in advance		75.00
May	1892. By cash		18.75
June	" " "		27.50
July	" " "		27.50
Aug.	" " "		27.50
Sept.	" " "		27.50
Oct.	" " "		27.50
Nov.	" " "		40.00
Dec.	" " "		40.00
Jan'y	1893. " "		40.00
Feb'y	" " "		40.00
Mar.	" " "		40.00
Ap'l	" " "		40.00
May	" " "		40.00
June	" " "		40.00
July	" " "		40.00
Aug.	" " "		40.00
Sept.	" " "		40.00
Oct.	" " "		40.00
Nov.	" " "		40.00
Dec.	" " "		40.00

To Woods Lott & Broach:

Jan'y	1894.	"	"	.....	13.50
"	"	"	"	Dues.....	15.00
Febr'y	"	"	"	.....	15.00

7 To Woods Lott & Broach:

March	1894.	"	"	.....	15.00
Ap'l	"	"	"	.....	15.00
May	"	"	"	....	15.00
June	"	By cash.....			15.00
July	"	"	"	....	15.00
Aug.	"	"	"	.....	15.00	$924.75
Nov.	/93.	By cash paid association through Mdn. nat'l bank.....				2611.00
		Total credits.....				$3535.75
		Amount 1st loan borrowed.....				2500.00
		Amount of excess paid and due me 1st loan.				$1035.75
Sept.	/94.	To amount of second loan Deed Book 36, p. 319.....				$2000.00

CREDITS.

		Six months premium paid in advance.....			$72.00
Sept.	1894.	By cash.....			32.00
Oct.	"	"	"	.....	32.00
Nov.	"	"	"	.....	32.00
Dec.	"	"	"	....	32.00
Jan'y	1895.	"	"	.....	32.00
Feb'y	"	"	"	.....	32.00
March	"	"	"	.....	32.00
April	"	"	"	.....	32.00
May	"	"	"	....	32.00
June	"	"	"	.....	32.00
July	"	"	"	....	32.00
Aug.	"	"	"	.....	32.00
Sept.	"	"	"	....	32.00
Oct.	"	"	"	..... .	32.00
Nov.	"	"	"	.....	32.00
Dec.	"	"	"	.....	32.00
Jan'y	1896.	"	"	.....	32.00
Febr'y	"	"	"	.....	32.00
March	"	"	"	.....	32.00
April	"	"	"	.....	32.00
May	"	"	"	....	32.00

8

June	1896.	By cash			$32.00	
July	"	"	"		32.00	
Aug.	"	"	"		32.00	
Sept.	"	"	"		32.00	
Oct.	"	"	"		32.00	
Nov.	"	"	"		32.00	
Dec.	"	"	"		32.00	
Jan'y	1897.	"	"		32.00	
Febr'y	"	"	"		32.00	
March	"	"	"		32.00	
						$1064.00
		By value 20 shares				649.70
March	/97.	By cash paid association				1473.96
		By total payments				$3187.66
		Amount second loan borrowed				2000.00
		Amount of excess paid and due me on 2nd loan				$1187.66
		Amount of excess paid and due me on 1st loan				1035.75
		Total				$2223.41
		Total amount due plaintiff				$2223.41
		Int. 6 % from M'ch /97 to date on				1187.66
		" " Nov. /93 " "				$1035.75
		Grand total				$

Filed July 7th, 1899.
W. D. CAMERON, *Clerk.*

Circuit Court, July Term, July 29, 1899.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION. } 5324.

This day came on to be heard by the court the motion of defendant to remove this cause to the U. S. circuit court, and thereupon by consent of the parties, the said motion was over-ruled and the defendant is hereby allowed sixty days from the end of this term to plead or demur, to the declaration herein, and if a demurrer
9 be filed, it is agreed that the hearing of the same at the October term shall not operate as defeating the plaintiff of his right to trial at that term, but if the said demurrer at the hearing be over-ruled, then the defendant shall plead instanter, and its cause shall be considered at issue, and for trial at said October term 1899.

In the Circuit Court of Lauderdale County, Miss., July Term, A. D. 1899.

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW York.

And the defendant, The National Mutual Building & Loan Association of New York, by Cochran & Bozeman, its attorneys, comes and defends the wrong and injury, when, etc., and says that it did not owe the said sum of money above demanded, or any part thereof, in manner and form as the plaintiff has above complained against it; and of this it puts itself upon the country, etc.

COCHRAN & BOZEMAN,
Attorneys for Defendant.

And the plaintiff will take notice that on the trial of this cause the defendant will give in evidence and prove:

That the defendant is a building and loan association incorporated under the laws of the State of New York, and domiciled in the city of New York, where all its business is transacted, and all monies due it are payable; that it never had a branch office in the city of Meridian; that it then had and still has an agent at Meridian, however, who had his own office and was allowed to receive and receipt for the dues on shares, and the interest and premium on loans, but such agent had no power to grant or make loans, and his authority was at all times revocable at the pleasure of defendant association.

That at the time of making each of the said mortgages set out in the complaint, the said plaintiff executed and delivered to the defendant, a bond to secure the repayment of the money loaned to him as described in said mortgages, and the dues on said shares and interest and premium on said loans, as in said mortgages set forth, and that by the terms of said bonds and each of them, all payments to be made on said loans, and for such interest, premium, and dues were to be made in the city of New York.

For the convenience of the plaintiff, he was allowed to pay the interest and premium on his loans, and the dues on his shares to an agent of the defendant at Meridian, to be forwarded to the home office at New York, but there was no agreement that such payments should be made at Meridian, and the permission to so make such payments was revocable at any time by the defendant.

That the payment of dues, interest and premium up to the time of full performance of the contracts would not of itself pay off the loans. Such loans would be paid off at maturity of the shares at the city of New York, by there crediting on the loans the maturity value of the shares, which value is in all cases made up of 5/6 of the amount paid on said shares, with profits credited thereto, and ade by the association, and made up of payments made by all rrowing members of the association for interest and premium on

their loans, and which profits all go into one common fund, which is apportioned quarterly among all the shares in force, from which as will be seen, it is not the payment of dues, interest and premium that repays a loan, but the application at this city of New York of a fund there accumulated and there applied at maturity of the shares, in repayment of the loan on surrender of the shares at the city of New York to the association.

That in both of said loans the plaintiff made application in writing to the said defendant in the city of New York, where said applications were passed on and granted by the executive committee of said defendant, which committee had the sole and exclusive power to grant loans to be made by said defendant, and that said plaintiff was notified by said defendant in writing when said applications were granted.

That said loans were repaid at the city of New York, as provided in said bonds and mortgages. That at the time of making said loans this defendant was making loans to its members in the State of New York, and other States, which were all made on the
11 same terms as said loans to plaintiff, and were all made payable in the city of New York for the sake of uniformity of construction and practice, and not to evade the usury laws of Mississippi, for when said first mortgage was drawn and executed in May, 1892, the laws of Mississippi allowed building and loan associations by express statute to charge more than ten per cent. interest on loans, and such interest as might be agreed upon by the parties to such loans.

That defendant is a corporation duly organized and incorporated under chapter 122 of the Laws of the State of New York, passed April 10th 1851, entitled "An act for the incorporation of building, mutual loan, and accumulating fund associations" and of the acts amendatory thereof, to-wit: chapter 564 of the Laws of New York, passed June 9th 1875, and chapter 96 of the Laws of New York, passed April 1st, 1878, and that it was so duly organized and incorporated on or about the 19th day of April 1888, by executing and filing in the office of the clerk of the county of New York in said State of New York, articles of association with the certificates required by such laws, duly executed in the manner and form required by said laws, and that upon filing said articles of association this defendant became and was a corporation under the laws of the State of New York, and from and ever since said filing of said articles of association, this defendant has carried on business as a corporation, to-wit: as a building and loan association at the city of New York in the State of New York.

Section 7 of said chapter 122 of said Laws of 1851 as amended by said chapter 564 of said Laws of New York, passed June 9th, 1875, provide as follows:

No holder of redeemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association, upon the ground that, by reason of losses or otherwise, the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount

to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for the non-payment of dues or fees, or other violation of the articles of association, nor shall the making of any monthly payment required by the articles of association or of any premium for loans made to members be deemed a violation of the provisions of any statute against usury.

The said articles of association were duly amended in the manner and form prescribed by laws in the month of April, 1889, 1890, 1891, and 1893. The said articles as amended in April, 1892, were the articles of association in force when said loans were made
12 in May, 1892, and in August, 1894, and under said articles of association this defendant was authorized and empowered to charge a fine of ten cents per month on each share for each and every month such share might be in arrears for non-payment of dues, interest or premium, and to collect interest at six per cent. per annum on the principal sum, and a premium of fifty cents per month on each one hundred dollars borrowed, and sixty cents per month on each share pledged on each loan, and was also authorized under the laws of New York to collect interest on the full amount of the principal of the loan, to wit: on the $2500.00 and $2000.00 loaned to the plaintiff, although part of the premium on said loans might have been paid in advance, and that under the laws of New York, the collection of such interest, premium, dues and fines is not usurious, and the payment and collection of such fixed premium is lawful and proper.

That the application- for said loans were made and granted in the State of New York; that the bonds and mortgages given to secure said loans to plaintiff provide that the interest and premium on said loans and the dues on said shares and all fines shall be paid, and that said loans shall be repaid at the office of said defendant in the city of New York and State of New York, and further shows that checks for $2500.00 on said first loan, and for $2000.00 on said second loan were drawn by said association to the order of said plaintiff on the Mercantile Trust Company of New York on the 21st day of May, 1892, and on the 30th day of August, 1894, respectively, and were thereupon delivered to said plaintiff and endorsed by him, and were then paid by said trust company at the city of New York, and that said contracts as shown in said bonds and mortgages executed by said plaintiff are New York contracts, and their validity is to be governed and determined by the laws of the State of New York, where said contracts are payable.

That the plan under which defendant association has made all its loans is substantially the same as that of numerous other building and loan associations incorporated under said laws of the State of New York, and the loans made by this association and other similar associations incorporated in New York, and made on the same terms as the said loans made to plaintiff have been held valid, and legal, where the defense of usury has been made, by the
13 highest courts of the States of Virginia, West Virginia and Pennsylvania which courts have all held that the contracts so made by this association and other similar association- incorpo-

rated in New York under said laws, are New York contracts, and that their validity is to be determined by the laws of New York where such contracts are made payable, and the highest courts of New Jersey and West Virginia also held that the payment of a fixed premium is legal and proper, and the form of payment of premium which is most equitable and advantageous to the borrower.

The plan on which all loans have been made by the defendant association is as follows:

Loans can be made only to members of the association, who are required to hold and pledge one share of the maturity value or $100.00 for each $100.00 borrowed, and to pay dues on each share of .60 per month and to pay interest at six per cent. per annum on each $100.00 borrowed until the shares mature, and a monthly premium of fifty cents on each $100.00 for not over eight years from the date of the loan. 5/6 of the amount paid for dues on shares is credited to the share of the borrower, and the fund so formed with profits credited thereto works the maturity of the shares.

Profits are made up of interest and premium paid by all borrowers, fines paid, and the difference between the withdrawal value and holding value of shares, when shares are withdrawn before maturity.

These profits all go into one common fund, and are apportioned quarterly to all shares in force, according to their capital value.

No payments so made can be credited on the principal of the loan and the amount due the association at any time on a loan is the principal sum as stated in the bond and mortgage, with any accrued interest and premium thereon.

When the shares become worth $100.00 each, their value is to be applied under the contract in repayment of the principal sum borrowed on their being surrendered to the association, the maturity value of each share, to-wit $100.00, then repaying $100.00 of said principal sum, but no credit can be made on the principal sum, nor is such sum in any way reduced before the loan is repaid at maturity of the shares as above explained, or before maturity of the shares if desired by the borrower, in which latter case the borrower can use the value of his shares in part payment of the amount due on the loan for principal, interest and premium, on surrendering such shares to the association, and pay the remainder due in cash.

The plan of the loan, however, contemplates that payments
14 will be continued until the shares pledged mature, when their value is to be applied as above shown.

In the case of the two loans made to said Brahan the holding and pledging of his shares was a part of the loan contract.

Said Brahan was a member of said defendant association and the holder of 25 shares in certificate No. 10190 of said association when said first loan was made, and assigned and pledged said shares as collateral security on said loan, with the understanding and agreement that he as such member should share in the profits of said association made up of payments by himself and other borrowers also members of said association on loans to them by said association which were all made on the same terms as the said loan to said

Brahan and which profits as provided by the articles of association of said defendant association were to be distributed quarterly and apportioned to all the shares of said association, and that such profits were so distributed quarterly and apportioned to all the shares issued by said association during the continuance of said loan and while said loan was in force, including said shares held by said Brahan, the contract being that when said share- should reach maturity, or become worth $100.00 per share from the profits so apportioned to such shares quarterly the value of each of said shares then worth $100.00 would be applied in payment of $100.00 of the principal sum borrowed.

That said Brahan desired to pay off said first loan before maturity by paying the principal sum borrowed with the interest and premium due thereon, and was entitled to use the then withdrawal value of his said shares in part payment of such loan but agreed and elected as a part of the final settlement and repayment of his loan to pay said principal, interest and premium in cash and to continue his shares in force and to receive said profits earned during the continuance of said loan and all similar profits by having the same apportioned and applied as a credit to the value of his said shares and to continue the same in force and said profits amounting to $21.20 were so apportioned and credited to his said shares, which were thereby largely increased in value, and further profits were so apportioned and credited to five of said shares until with-
15 drawn, and to the other 20 of said shares up to the time of the payment of the second loan to him by said association on or about the 10th day of March 1897.

As was said by the court in the case of Natchez Building and Loan Association *v.* Shields, the plaintiff "voluntarily made the settlement plainly shown in the record, and this he did with full knowledge of all the facts. In this voluntary settlement he made no mistake of fact; he has received subsequent enlight-ment of law, as he now supposes."

"In this voluntary settlement made with his eyes open," * * * "he received his share of all the profits made by the association during his membership and while enjoying the money loaned him; and these profits embraced his ratable part of all interest paid by all borrowing members, himself and others.

"In that settlement he took, as his own, his part of all interest now supposed to have been usurious and yet holds it." As a part of and at the time of said second loan said Brahan, who was then a member of said association assigned and pledged 20 of said shares to said association as collateral security on said second loan with the same understanding and agreement as when pledged on said first loan—to-wit: that he should receive his share of all profits of the association made up of payments by himself and other borrowers on loans made on precisely the same terms as the said second loan made to said Brahan.

That after paying said first loan plaintiff continued to pay dues on said 25 shares until August 1894, and that on the 3rd day of October 1894, plaintiff withdrew five of the said shares, and received their withdrawal value which was..... $73.90
and was made up as follows:

He had paid dues thereon for 28 months amounting to $84.00.

5/6 of this amount had been credited to his share account.....	$70.00	
On this amount he was entitled to receive interest for the average time.....	4.90	
Which amounted to.....	$74.90	
Withdrawal fee was.....	1.00	
		$73.90

16 This interest of $4.90 was made up from payments made by himself on said first loan, and by other borrowers for interest and premium on loans made on precisely the same terms as the loans to plaintiff, now alleged to have been usurious, and was the amount of profits on his share fund to which he was entitled on withdrawing such shares, and included the profits earned by his said 5 shares while they were pledged on said first loan, and such profits so made up of alleged usurious payments are still held and retained by plaintiff. Under the articles of association the plaintiff on withdrawing said shares could not receive their full value, but only what is called the withdrawal value, as the member withdrawing his shares under the articles then in force, surrendered to the association some part of the profits earned by his shares.

Said loan was repaid in November and December, 1893, and January, 1894 as follows:

Amount required to pay loan Nov. 15, 1893, was.....	$2611.00
Brahan paid Nov. 15/1893, cash.....	2500.00
Balance as principal then due.....	$111.00
Add November dues.....	15.00
	$126.00

He paid balance $126.00 as follows:

On December 19, 1893.....	$112.50	
On Jan'y 17, 1894.....	13.50	
		$126.00

Defendant will further give in evidence and prove that when said second loan was repaid, and as a part of such repayments on or about March 10th 1897, the said Brahan elected to and did receive his share of all of said profits as such member on the 20 shares pledged on such loan, made up in part of profits earned and apportioned to his said 20 shares during the continuance of said first loan

and still holds the same, and surrendered said shares to said association and received their withdrawal value by having the same then credited in part payment of the amount then due on said loan, and paid the remainder then due on said loan in cash.

The amount then due on said loan was.....	$2123.66
The withdrawal value of said 20 shares then was.....	649.70

17 which was at his request then applied in part payment of said loan, leaving the sum of $1473.96 to be paid in full discharge of said loan and which sum said Brahan paid in cash, on March 10th, 1897.

The withdrawal value of said 20 shares was made up as follows:

He had paid dues thereon for 58 months.....	$699.00
5/6 of this amount was credited to his share account.....	580.00
½ profits as per apportionment Dec. 31, 1896.....	70.00
	650.70
Withdrawal fee was.....	1.00
Withdrawal value was.....	$649.70

When these shares were withdrawn plaintiff under the articles of association was entitled to receive on such withdrawal, and did receive, 5/6 of the amount paid for dues on shares and ½ the profits credited thereto, and the $70.70 of profits so paid to, and received by him, was made up of payments made by him on his said loan for interest and premium, now alleged to have been usurious payments, and of payments of interest and premium made by other borrowers on loans to them by this defendant on precisely the same terms as said loan to plaintiff, and which payments were all usurious, if the payments made by plaintiff were usurious, and the plaintiff still holds said profits, alleged by him to be usurious.

Whereby said Brahan by reason of his said voluntary settlement and his so participating in and receiving and holding said profits (made up from such payments by himself and other borrowing members) in his settlement and payment of said loans and each of them, and on the withdrawal of said five shares, and which payments were all usurious, in fact, the payments made by him were usurious, is estopped from setting up his claim of alleged usury in his said payments as a ground for recovery in this action.

Defendant will further give in evidence and prove that of the payments complained of by plaintiff the sum of $780.00 was paid as dues on the said shares of stock owned and held by plaintiff for the purpose of maturing said stock, and not as payments upon said loans, and that plaintiff well knew this, and that said sum has long since been repaid to plaintiff, and received by him, in to-wit: the value of said shares when he withdrew the same.

18 Defendant will further give in evidence and *prove* that plaintiff's cause of action for the monies alleged to be due him, and for each and every item thereof, did not accrue to

plaintiff at any time within three years next before the commencement of this suit, and is barred by limitation; and that plaintiff's said cause of action for all the sums complained of, and for each and every item thereof, did not accrue to plaintiff at any time within one year before the commencement of this suit, and is barred by limitation.

COCHRAN & BOZEMAN,
Att'ys for Defendant.

Filed Sept. 27, 1899.
W. D. CAMERON, *Clerk.*

In the Circuit Court, April Term, 1901.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION. } No. 5324.

And the defendant moves the court for leave to amend its notice under the general issue by adding thereto the amendment herewith shown the court.

And in this connection the defendant shows the court that the said proposed amendment will not in any way delay the final hearing of said cause, but that said amendment is necessary in order that the merits of the controversy may be fairly brought to trial.

COCHRAN & BOZEMAN,
Defendant's Attorneys.

In the Circuit Court of Lauderdale County, April Term, 1901.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION. } No. 5324.

Amendment to Notice under General Issue.

And the defendant by leave of the court first obtained, amending its notice under the general issue, will further show and
19 prove that each of the contracts in question is good and valid, and not usurious under the laws, public acts, records and judicial proceedings of the State of New York, where each of said contracts was made and is performable, and by which acts, records and judicial proceedings the validity of said contracts is to be construed and determined; that under section 1, article IV of the Constitution of the United States the defendant is entitled to have full faith and credit given by the courts of this State to said public acts, records and judicial proceedings of the State of New York; wherefore defendant sets up and relies upon said section 1 of article IV of the Constitution *of* the United States, under and by virtue of which it is the duty of this court to uphold the validity of said contracts as being enforceable and not usurious.

And the defendant further relies upon section 10 of article I of the Constitution of the United States in which it is provided that "No State shall pass any law impairing the obligation of contracts * * *," and section 1 of article XIV of the amendments of the Constitution of the United States in which it is provided "* * * nor shall any State deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," and says that it is entitled to have this court give full force and effect to said provisions of the Constitution of the United States in construing said contracts and determining this case, and that under said provisions of the Constitution the said contracts are valid and enforceable and not usurious.

COCHRAN & BOZEMAN,
Attorneys for Defendant.

STATE OF MISSISSIPPI:

In the Circuit Court of Lauderdale County, April Term, 1901.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION.

Comes the defendant, by Cochran & Bozeman, its attorneys, and moves the court for leave to amend its notice under the general issue in said cause by adding thereto the amendment hereto attached and shown the court;

And defendant says that said proposed amendment is necessary in order to bring the merits of the controversy between the parties fairly to trial; that the final trial of said cause will in no way be delayed by the filing of said amendment; and said amendments are not asked to be filed for the purpose of delay, but that the merits of said cause may be brought fairly to trial.

COCHRAN & BOZEMAN,
Attorneys for Defendant.

A. S. BOZEMAN.

Sworn to and subscribed before me by A. S. Bozeman of counsel for defendant this Aug. 6th, 1901.

W. D. CAMERON, *Clerk.*

THE STATE OF MISSISSIPPI:

In the Circuit Court of Lauderdale County, April Term, 1901.

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF New York.

And the defendant, The National Mutual Building and Loan Association of New York, by leave of the court first obtained amending its notice under the general issue herein will further give in evidence and prove and show to the court:

1. That at the time of issuing said stock and making said loans in question, the defendant association was a resident and citizen of the State of New York, and the plaintiff, F. V. Brahan, to whom said loans were made, was then a resident and citizen of the State of Mississippi, and that under the Constitution of the United States, and particularly under the fourteenth amendment thereof, the complainant had the right as a citizen and resident of Mississippi to become a member and shareholder in defendant association, and to procure said loans or advance upon his shares upon the terms
21 and conditions set out in said contract and the articles of association, and particularly to make said contract payable and performable in said State of New York; and the defendant association as a citizen and resident of said State of New York had the right to make said loans to plaintiff, then a citizen and resident of Mississippi upon the terms aforesaid, and to have said contracts made payable in the State *of* New York, and defendant has the further right under said constitution- amendment to have said contracts, which are New York contracts, construed and enforced and their validity determined by the laws of the State of New York, where they are performable.

2. And defendant further says that it never had an office in the State of Mississippi but made sales of shares in said State, through agents residing in said State, and that it made said loans, to said F. V. Brahan, at and from its office in New York city, and that each of said bonds, delivered to defendant *to defendant* association at the city of New York, in accordance with the previous agreement there made to make such loans, was a New York contract, to which the giving of a mortgage on lands in Mississippi was only an incident, and that making said loans, payable in New York, and secured by mortgage on lands in Mississippi, was doing business in the State of New York, and was not doing business in the State of Mississippi.

3. And as to any laws of the State *of* Mississippi that this court may consider, in determining the validity of said contract and the enforcement thereof, this defendant relies upon section 10 of article I of the Constitution of the United States, in which it is provided that no State shall pass any *ex post facto* law or law impairing the obligation of contracts.

And the defendant says that at the time of making the loans and contracts in question in this case, there had been no legislation by the legislature of said State of Mississippi concerning the public policy of said State as applied to foreign building and loan associations, or their contracts with their members; nor had there been rendered at that time any decision by the courts of said State defining the public policy of said State in reference to such associations or their contracts; but defendant says that at that time foreign building and loan associations were permitted to do business
22 in said State without special legislative restriction, except that they were required by the statutes of said State to pay a privilege tax. And the defendant says that the decision of the supreme court of Mississippi, rendered in the case of Sokoloski *vs.* The New South Building & Loan Association, reported in 77 Miss.,

155, *et seq.*, in so far as it undertakes to set up and define the public policy of the State of Mississippi in regard to foreign building and loan associations, and contracts between such associations and the members thereof, is tantamount to judicial legislation; and inasmuch as the said decision was rendered at the May term 1899, of said supreme court, at a time long subsequent to the date of the contract in question in this case, the application of said decision and of the declaration of public policy as therein set forth, and subsequently followed by said supreme court in other cases, to the construction and enforcement of the contract in this case, is contrary to the provisions of the Constitution of the United States, and particularly section 10 of article I thereof, in that it is in effect the passage of a law both *ex post facto* and impairing the obligation of said contract.

4. And defendant says further that said decision of the supreme court of Mississippi in the Sokoloski case above referred to, and the subsequent decisions of said court following the decision in the Sokoloski case, as applied to the contracts in this case, are contrary to the Constitution of the United States and particularly section 1 of article 4 thereof, in that full faith and credit is not given in said decisions to the public acts, records, and judicial proceedings of the other States where said associations are domiciled.

5. And defendant says further that under said section 1 of article 4 of the Constitution of the United States, and the public acts, records and judicial decisions of the State of New York and particularly chapter 122 of the Laws of the State of New York passed April 10th, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations" and the acts amendatory thereto, to-wit: chapter 564 of the Laws of New York passed June 9th, 1875, and chapter 96 of the Laws of New York passed April 1st, 1878, and the articles of association of the defendant, executed and filed in the office of the clerk of the county
23 and State of New York in the manner and form required by the laws of said State on April 19th, 1888, and subsequently amended in the months of April 1889, 1890, 1891, and 1892; and the decision of the supreme court of said State of New York in the case of Association *vs.* Read, reported in 93 New York, 474, the contracts in question in this case are valid and enforceable and not usurious; and under said section of the Constitution of the United States the defendant is entitled to have full faith and credit given to said public acts, records and judicial proceedings of the State of New York by the courts of Mississippi in the construction and enforcement of said contracts.

6. And defendant says that said contract is valid and enforceable according to its terms, under the laws of the State of Mississippi, when construed and interpreted according to said section of the Constitution of the United States and said other provisions of said Constitution and the amendments thereof.

COCHRAN & BOZEMAN,
Attorneys for Defendant.

Filed Aug. 6th, 1901.
W. D. CAMERON, *Clerk.*

THE STATE OF MISSISSIPPI,
Lauderdale County.

In Circuit Court, ——— Term, 1901.

F. V. BRAHAN, Plaintiff,
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF N. Y., Defendant.

Plaintiff, by attorneys, moves the court to strike out the amendments to notice under the general issue, filed with the clerk of this court on April 20th, 1901, and the motion and amendment to pleas of defendant filed with the clerk of this court on Aug. 6/1901. leave of the court not having been first obtained in either filing;

And because; issue had previously been taken by the pleadings in the cause, and time for pleading has long since expired.

24 2nd. Because: The defendant made an attempt to remove the cause to the Federal court at an earlier term of this court, which application was made after the first, or return term of this court, and the *application* was denied.

3rd. Because: The principal amount now involved, as is shown by the agreed statement of facts in the case is under $2000.

And because, lastly, the said motion and amendments to the pleadings sought to be filed are not available to defendant, under the constitution, laws and decisions of the supreme court of this State.

FEWELL & SON,
Att'ys for Motion.

Filed Oct 10th, 1901.
W. D. CAMERON, *Clerk.*

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION of New York. 5324.

This cause coming on to be heard on the motions of the defendant to allow it to file certain amendments to the pleas of defendant heretofore filed, and also the motion of plaintiff to strike out the amendments to notice under the general issue filed with the clerk of this court on April 20, 1901, and the motion and amendments to pleas of defendant filed with the clerk of this court on Aug. 6, 1901—all being filed without leave of the court—and the court having heard and considered both of said motions:

It is considered by the court that the defendant motion be and the same is hereby overruled and denied and that plaintiff's said motion be and the same is hereby sustained, and that defendant's said amendments of date April 20, and Aug. 6, 1901, be stricken from the file of said cause. To which action of the court defendant then and there excepted.

Filed Oct. 16/1901.
W. D. CAMERON, *Clerk,*
By I. R. McEROY.

25 *Bill of Exceptions.*

Circuit Court, Lauderdale Co., October Term, 1901.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION. } 5324.

Be it remembered that on the trial of this cause at the October term, 1901, the plaintiff gave in evidence on his behalf as follows:

In the Circuit Court of Lauderdale County, Miss.

F. V. BRAHAN
vs.
NATIONAL MUTUAL B. & L. ASS'N.

Plaintiff's Testimony.

It is agreed that in 1892 the defendant association had an agent in the city of Meridian who was authorized to receive applications for stock and loans and to receive payments of dues, interest and premium, and to transmit said applications and payments to the defendant association at its office in New York. That the defendant never had any domicile in Mississippi, but has always been domiciled in the city and State of New York. That the plaintiff was in 1892, and is now, a citizen and resident of the city of Meridian, Mississippi. That in 1892 the plaintiff made written application to the defendant, through its agent at Meridian, for a loan of $2500.00, said application being attached to the deposition of Wm. Gibson as document 2; that in order to obtain the loan it was necessary for plaintiff to first subscribe for 25 shares of stock of the defendant association, and to pay the fees therefor (because defendant made loans to its stockholders only). Defendant was required also to furnish an abstract of title of the land offered as security, at his own expense. The plaintiff having subscribed for said 25 shares of stock, the said loan was granted him by the executive committee of the defendant association, under the terms and according to the provisions of the articles of association attached to the deposition of Wm. Gibson as Exhibit "I," and of the bond, assignment of shares and mortgage, all dated May 21st, 1892, executed by plaintiff to the defendant in consideration of said loan, also attached as ex-
26 hibits to said deposition and which are in evidence. The plaintiff made the following payments as dues, interest, premium and fines on said stock and loan, to-wit:

$66.25 advance premium sent the association at New York,
$668.75 paid defendant's agent at Meridian as shown by the receipt book hereto attached, and $2500.00 paid the association in New York by draft sent them on November 7th, 1893, in full payment of said loan of May 21st, 1892.
$735.00

When he repaid said loan plaintiff retained his said 25 shares of stock, and after paying said loans made the following payments of dues on said stock, as shown by said receipt book; total $135.00, for the months of December, 1893, to August, 1894, inclusive.

In October, 1894, plaintiff withdrew five of said shares of stock and received from the association $73.90, the withdrawal value thereof.

In June, 1894, plaintiff made the written application for a second loan of $2000.00, on his remaining 20 shares of stock, which application is attached to said deposition as document three. Said application was forwarded to defendant in New York by C. F. Woods, its agent, and was there granted by its executive committee, and, in consideration of said loan, so made plaintiff, he executed to defendant his bond, assignment of shares and mortgage of date August 30th, 1894, attached hereto as parts hereof; and, afterward, plaintiff paid on said stock and loan the following dues, interest, premium and fines, etc.:

$868.00	as shown by said receipt book attached hereto,
$1473.96	paid defendant by draft on New York on March—1897, in full settlement of said loan; the said association having at plaintiff's request also credited on said loan and retained $649.70, the withdrawal value of said 20 shares of stock.
$2341.96	

The payments credited in said receipt book, opposite the initials of said agents, were paid to said agents at Meridian, Miss., the other payments were sent direct by plaintiff to the association at New York. The dates in said receipt book indicate the dates on which said payments were made to said agents at Meridian.

27 This statement is to be used in connection with the defendant's testimony, to-wit: the deposition of Wm. Gibson and Geo. J. Peet, with the exhibits thereto; all going in subject to objections for irrelevancy and incompetency, except as to the identification of said exhibits, which is agreed to be sufficient.

F. V. BRAHAN.
THE NATIONAL MUTUAL B. & L. ASS'N OF N. Y.,
By COCHRAN & BOZEMAN,
Att'ys of Record.

Bond to the National Mutual Building and Loan Association of New York.

Know all men by these presents, that *I, Frank V. Brahan of the city of Meridian* in the county of *Lauderdale* and State of *Mississippi*, the owner of *20* shares of the National Mutual Building and Loan Association of New York in certificate number *10190* issue *E 5, am* held and firmly bound unto the National Mutual Building and Loan Association of New York in the sum of *four thousand* dollars, lawful money of the United States, to be paid to the said association, its successors and assigns, for which payment well and truly to be

made, *I* bind *myself, my* heirs, executors or administrators, jointly and severally, firmly by these presents.

Sealed with *my* seal, and dated this *thirtieth* day of August in the year of our Lord one thousand eight hundred and ninety *four*.

The condition of this obligation is such, that if the above bounden *Frank V. Brahan*, his heirs, executors or administrators, shall well and truly pay or cause to be paid unto the above named National Mutual Building and Loan Association of New York its successors or assigns, the sum of *two thousand* dollars at its office in New York city, with interest for the same at the rate of six per cent. per annum until paid, together with a monthly premium of *ten* dollars and *no* cents for eight years or until the earlier maturity of said shares, should they mature before the expiration of the eight years, and in addition thereto the sum of *twelve* dollars and *no* cents for the monthly dues on the said *20* shares, which interest, premium and dues are payable monthly on or before the last business day of
28 every month, at the office of the association in New York city, until the maturity of the said shares, except the said monthly premium which is to be paid for eight years only, and also all fines which may be imposed by the said association for default in payment of said interest, premium or dues, and shall truly keep and perform all the conditions herein contained, and required by the articles of association of said obligee, and by such amendments as may be lawfully made to said articles, then this obligation to be void, otherwise to remain in full force and virtue.

And it is further hereby expressly agreed, that should any default be made in the payment of the said interest, premium, dues or fines, or in the re-payment to said association of any insurance premium paid by said association as hereinafter mentioned, or of any taxes or assessments paid by said association as described in the mortgage accompanying this bond, or any part thereof, and the same shall remain unpaid and in arrears for three months, or should any tax or assessment levied or imposed upon the premises described in the said mortgage become due and payable, and remain unpaid and in arrears for three months, then and from thenceforth, that is to say after the lapse of the said three months in either of the proceding events, the aforesaid principal sum and any and all sums for interest, premium, dues or fines shall, at the option of the said association, its successors and assigns, become and be due and payable immediately thereafter, anything hereinbefore contained to the contrary notwithstanding.

And it is hereby expressly agreed, by and between the parties to these presents, that the said obligor shall keep the buildings erected and to be erected upon the lands described in the mortgage accompanying this bond, insured against loss and damage by fire, in an amount, and by insurers approved by the said obligee, its successors and assigns, and pay the premiums therefor, and deliver to said association the policy of insurance as a collateral security hereto with a mortgagee clause thereto attached in form approved by said association, and in default thereof it shall be lawful for the said obligee to effect such insurance, and to pay the premium therefor, and

procure such mortgagee clause to be attached to the policy and to all renewals thereof, and the premium or premiums paid for such insurance, and any and all sums so paid by said association for
29 taxes or assessments shall be added to the principal sum hereby secured to be paid, and shall be payable with interest at the rate of six per cent. per annum from the time of such payment with the monthly dues falling due on said shares in the month in which such payment is made. And the party of the first part hereby waives the benefit of *his* homestead exemption as to this debt. And it is understood and agreed, that the obligor can pay said loan to said association at any time after one year from the date thereof, by giving thirty days' notice in writing to the secretary of the said association, and upon the payment of the principal sum with interest and premium due thereon, and all dues and fines on said shares, and a redemption fee, as provided in the articles of association of said obligee. And it is hereby expressly agreed by and between the parties hereto that this bond is made with reference to and under the laws of the State of New York, which are to govern in enforcing and expounding this contract.

FRANK V. BRAHAN.

Signed, sealed and delivered in the presence of—
A. S. BOZEMAN.

—— ——.

Assignment to the National Mutual Building and Loan Association of New York.

Know all men by these presents, that *I, Frank V. Brahan*, of the city of *Meridian*, in the county of *Lauderdale* and State of *Mississippi* in consideration of a loan made to *me* by the National Mutual Building and Loan Association of New York, of *two thousand* dollars, have agreed to assign and transfer and do hereby assign and transfer, unto the said association, its successors and assigns, all *my* right, title and interest in and to *20* shares of the stock of said association, certificate *No. 10190* issue *E5* now belonging to *me*, and standing in *my* name, as a security collateral to my bond this day given to the said association for the payment of said loan and interest and premium thereon, and the monthly dues on said stock at the times and in the manner therein mentioned. And *I* hereby authorize said association, in case *I* should make default in the payment of said loan and interest thereon or any part thereof, or in the payment of monthly dues as required by said bond, or any fines, and shall
30 so remain in default for three months, to cancel said shares of stock above described, and apply the withdrawal value thereof at such time upon *my* said loan and in the event any surplus remains after the full payment of said loan and interest thereon, premiums, dues and fines, the same shall be paid to *me my* executors, administrators, or assigns, and *I* hereby covenant and agree with said association to continue to pay dues upon said shares of stock until said loan shall be wholly paid.

In witness whereof I have hereunto set *my* hand and seal this *30th* day of *August*, in the year one thousand eight hundred and ninety *four*.

FRANK V. BRAHAN.

Sealed and delivered in the presence of—
A. S. BOZEMAN.

THE STATE OF MISSISSIPPI, }
Lauderdale County. }

This indenture, made the *thirtieth* day of *August* in the year of our Lord one thousand eight hundred and ninety *four*. Between *Frank V. Brahan of the city of Meridian, county of Lauderdale and State of Mississippi and* Judith W. Brahan, *his wife* parties of the first part, and the National Mutual Building and Loan Association of New York, a corporation organized and incorporated under the laws of the State of New York, party of the second part.

Whereas, the said *Frank V. Brahan* owner of *20* shares of the said association, in certificate No. *10190* issue *E 5* is justly indebted and stands firmly bound unto the said National Mutual Building and Loan Association of New York, in the sum of *two thousand dollars* for money lent or advanced to *him* by said association in accordance with and upon the terms prescribed in the articles of association thereof, to be paid by *his* certain bond or obligation bearing even date with these presents, in the penal sum of *four thousand* dollars conditioned according to the said articles, for the payment of the said sum of *two thousand* dollars, to the said association, at its office in the city of New York, with interest for the same at six per cent. per annum until paid, together with a monthly premium of *ten* dollars and *no* cents for eight years, or until the earlier maturity
31 of the said shares, should they mature before the expiration of eight years, and the sum of *twelve* dollars and *no* cents for the monthly dues on the said *20* shares, which interest, premium and dues are payable monthly on or before the last business day of each and every month, at the office of the association in the city of New York, until the maturity of said shares, except the said monthly premium which is to be paid for eight years only. *And also* for the payment of all fines which may be imposed by the said association for default in the payment of said interest, premium and dues.

Provided however, and it is hereby expressly agreed that if at any time default should be made in the payment of said interest, premium, dues or fines, or in the re-payment to said association of any and all sums paid by said association for taxes, assessments or insurance premium as hereinafter mentioned, for the space of three months after the same shall fall due, or should any tax or assessment, levied or imposed upon the premises hereinafter described, become due and payable and remain unpaid and in arrears for three months, then the aforesaid principal sum and all interest and premium shall at the option of said association, become and be due and

payable immediately thereafter, and may be enforced and recovered at once, it being mutually understood and agreed however, that at the maturity of said shares said loan will be cancelled on surrender of *said* shares to the said association, provided the interest and premium on said loan have been fully paid.

Now this indenture witnesseth that the said parties of the first part for the better securing the payment of the said loan mentioned in the condition of the said bond, according to the true intent and meaning thereof, and for and in consideration of the sum of one dollar to *them* in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey and warrant unto the said party of the second part and to its successors and assigns for ever the land described as: all that lot, piece or parcel of land, with the improvements thereon, situate in the city of Meridian, county of Lauderdale and State of Mississippi, known as lots six (6), seven (7), eight (8), nine (9) and ten (10) in block one hundred and forty-five (145) of Ragsdale's survey of the city of Meridian, and which lots are bounded southerly
32 by Sixteenth (16″) street; easterly by Twenty-fifth (25″) avenue, and westerly by Twenty-sixth (26″) avenue.

Together with the appurtenances, and all the estate, right, dower and right of dower, of the said parties of the first part, in, and to said premises; *to have and to hold* the above granted premises unto the said party of the second part, its successors and assigns, forever. And for the purpose of further securing the performance of the conditions of said bond, the said *Frank V. Brahan* hereby agrees to pay all taxes and assessments when imposed legally upon said premises, and should — make default in payment thereof, the said party of the second part may, at its option, pay off the same; and to further secure said indebtedness first above named, the said *Frank V. Brahan* agrees to keep the building erected, or to be erected, on said premises insured against loss or damage by fire for the benefit of the mortgagee for at least *two thousand dollars* in some insurance company satisfactory to the party of the second part, and to deliver the policy or policies and all renewals of policies to said association, or its authorized agents, with a mortgagee clause thereto attached, in form approved by the said party of the second part, and, in default thereof that the said party of the second part may, at its option, as *his* agent procure such insurance for said sum, and pay the premium therefor, and procure said mortgagee clause to be attached to the policy or policies, the policy if collected to be credited on said indebtedness, less the cost of collecting same, and all amounts so paid for taxes, assessment or insurance, shall become a debt to the party of the second part additional to the indebtedness hereby specially secured, and shall be covered by this mortgage and bear interest from date of payment, and be due and payable with the monthly dues on said shares falling due in the month in which payment is made.

Provided always, and these presents are upon this express condition that if the said parties of the first part, *their* heirs, executors or administrators, shall keep and perform all the conditions of said

bond or obligation, according to the true intent and meaning thereof, and shall reimburse the party of the second part for any amount so expended as taxes, assessments, insurance and interest thereon then these presents and the estate hereby granted shall cease, determine and become void.

33 And the said *Frank V. Brahan for himself, his heirs,* executors and administrators, do- covenant and agree to do and perform all the conditions of said bond and obligation according to the true intent and meaning thereof, but should default be made in the payment of any sum *do* expended by the said party of the second part, or in the performance of any of the conditions of the said bond, then, in any one of the said events, the whole of said indebtedness shall at once become due and payable, and this mortgage be subject to foreclosure as now provided by law in case of past due mortgages, and the said party of the second part, its agents or assigns, shall be authorized to take possession of any or all of said property without any process of law, and sell the same at public outcry before the court house door in said county, to the highest bidder for cash, after first giving twenty days' notice of the time, place and terms of said sale by advertisement in a newspaper published in said county, or, by posting written notices thereof in three or more public places in said county, and apply the proceeds of said sale: First, to the expense of advertising, selling and conveying, including a reasonable attorney's fee; second, to the payment of any amounts that may have been expended, or that may then be necessary to expend in paying insurance, taxes, or other encumbrances with interest thereon; third, to the payment of the amount due on said bond and mortgage in full, whether the same shall or shall not have fully matured at the date of said sale; but no interest shall be collected beyond the day of sale; and fourth, the balance, if any, to be turned over to the said *Frank V. Brahan* and the said *Frank V. Brahan* further agrees that said party of the second part its agents or assigns, may bid at said sale and purchase said property, if the highest bidder therefore, which sale so to be made shall forever be a perpetual bar, both in law and in equity against said parties of the first part *their* heirs and assigns, and against all other persons claiming or to claim the premises, or any part thereof by, from, or under *them* or either of *them*. And the said party of the second part, its successors or assigns, is fully authorized and empowered to execute deeds of conveyance to the purchaser, or his or her assigns, to such property as may be sold under this mortgage.

34 And the said parties of the first part do further covenant and agree with the said party of the second part its successors or assigns, that he will execute such further assurances of said property as may be requisite to convey the premises above described to the party of the second part.

And the parties of the first part hereby expressly waive and relinquish to the party of the second part, all benefits which they have, or to which they may be entitled in and to said premises by virtue of any law made or to be made in relation to the exemption of homesteads.

And it is hereby expressly agreed, by and between the parties hereto, that this mortgage is made with reference to and under the laws of the State of New York, which are to govern in enforcing and expounding this contract.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Witnesses:

FRANK V. BRAHAN. [SEAL.]
JUDITH W. BRAHAN. [SEAL.]

STATE OF MISSISSIPPI, }
Lauderdale County. }

Personally appeared before me, of said county, the within named Frank V. Brahan and Judith W. Brahan, his wife, who acknowledged that they signed and delivered the foregoing instrument on the day and year therein mentioned.

Given under my hand and official seal this 3rd day of September A. D. 1894.

B. J. CARTER,
Notary Public.

35

No. of book, 10190.	No. of certificate, 10190.	No. of issue, E 5.	No. of shares. 25.

Date of payment.	Dues.	Interest.	Premium.	Fines.	Signature of receiver.
1892.					
May	15.00	3.75			Woods & Carter.
June	15.00	12.50			W. & C. O. G. S.
July	15.00	12.50			Woods & Carter.
Aug.	15.00	12.50			Woods & Carter.
Sept.	15.00	12.50			Woods & Carter.
Oct.	15.00	12.50			C. F. Woods.
Nov.	15.00	12.50	12.50		C. F. Woods.
Dec.	15.00	12.50	12.50		C. F. Woods. B'.
1893.					
Jan.	15.00	12.50	12.50		C. F. Woods.
Feb.	15.00	12.50	12.00		W. & B.
M'ch.	15.00	12.50	12.50		C. F. Woods.
Ap'l	15.00	12.50	12.50		C. F. Woods.
May	15.00	12.50	12.50		W. & B.
June 7/12/93	15.00	12.50	12.50		W. & B.
July 8/11/93	15.00	12.50	12.50		W. & B.
Aug. 9/9/93	15.00	12.50	12.50		W. & B.
Sept. 12/16	15.00	12.50	12.50	2.50	W. L. & B.
Oct. 12/16	15.00	12.50	12.50	2.50	W. L. & B.
Nov. 12/16	15.00	6.25	6.25		W. L. & B.
Dec. 1/4/94	15.00				W. L. & B.
Jan. 2/8/94	15.00				W. L. & B.
Feb. 3/9	15.00				W. L. & B.
M'ch 4/6/94	15.00				W. L. & B.
Ap'l 5/9	15.00				W. L. & B.
May 6/8	15.00				W. L. & B.
June 7/10	15.00				" " " p'd L.
July 8/10	15.00				C. F. Woods.
Aug. 9/12	15.00				C. F. Woods.
Sept. 10/8	12.00	10.00	10.00		C. F. Woods.

Date of payment.	Dues.	Interest.	Premium.	Fines.	Signature of receiver.
36 1893.					
Oct. 11/7/94....	12.00	10.00	10.00	.....	C. F. Woods. (R.)
Nov. 12/8.....	12.00	10.00	10.00	.....	C. F. Woods
Dec. 1/21/95...	12.00	10.00	10.00	.....	C. F. Woods
1895.					
Jan. 3/7.....	12.00	10.00	10.00	2	C. F. Woods.
Feb. 3/7.....	12.00	10.00	10.00	.....	C. F. Woods.
M'ch 4/11.....	12.00	10.00	10.00	.....	C. F. W. (R.)
Ap'l 5/14.....	12.00	10.00	10.00	.....	C. F. W. (R.)
May 6/14.....	12.00	10.00	10.00	.....	C. F. Woods
June 7/16	12.00	10.00	10.00	.....	C. F. Woods
July 8/20	12.00	10.00	10.00	.....	C. F. W. (P.)
Aug. 9/20.....	12.00	10.00	10.00	.....	C. F. W. (P.)
Sept. 10/15....	12	10	10	.....	C. F. Woods
Oct. 11/13	12	10	10	.....	C. F. Woods
Nov. 1/15.....	12	10	10	2	C. F. Woods
Dec. 1/15.....	12	10	10	.....	C. F. Woods.
1896.					
Jan. 2/19.....	12.00	10	10	.....	C. F. W. (P.)
Feb. 3/26.....	12.00	10	10	.....	C. F. Woods
M'ch 4/16.....	12.00	10	10	.....	C. F. Woods
Ap'l 5/9.....	12.00	10	10	.....	C. F. Woods
May 6/8.....	12.00	10.00	10.00	.....	C. F. W. (P.)
June 7/17.....	12.00	10.00	10.00	.....	C. F. Woods.
July 8/12.....	12.00	10.00	10.00	.....	C. F. Woods
Aug. 9/15	12.00	10.00	10.00	.....	C. F. Woods
Sept. 10/17.....	12.00	10.00	10.00	.....	C. F. W. (P.)
Oct. 11/14.....	12.00	10.00	10.00	.....	C. F. W. (R.)
Nov. 12/23.....	12.00	10.00	10.00	.....	C. F. Woods.

37 DEFENDANT'S EXHIBIT 1.

Articles of Association of the National Mutual Building and Loan Association of New York, as Amended April 20th, 1892.

ARTICLE I.

Name, Location, and Objects.

SECTION 1. The name of this corporation is the "National Mutual Building and Loan Association of New York."

SEC. 2. The principal office of the association shall be in the city of New York.

SEC. 3. The objects for which the association has been formed are:

The accumulation of a fund for the purchase of real estate, the erection of buildings, the establishment of homes, making improvements on lands and paying off incumbrances thereon, aiding its members in acquiring real estate, making improvements thereon and removing encumbrances therefrom, and for the further purpose of accumulating a fund to be returned to its members who do not

obtain advances on their shares, when the funds of the association, to the credit of each share, shall amount to one hundred dollars, the full value of a share. And for the transaction of the general business of a building, mutual loan and accumulating fund association.

ARTICLE 2.

Members.

Any person of full age can become a shareholder in the association by subscribing to the application for membership and holding five or more shares of the association.

"Parents and guardians may take and hold shares in the association in behalf of and for the use of their minor children, or wards, provided the cost of such share be defrayed from the personal earnings of such minor children or wards, or by gifts from persons other than their male parents."

(Laws of New York, act 1851, § 6.)

ARTICLE 3.

Meetings, Votes.

SECTION 1. The first regular meeting shall be held within
38 thirty days after the incorporation of the association, for the election of officers of the association; and thereafter on the third Wednesday of April in each year, a general meeting of the association, for the election of directors, shall be held in the city of New York, at such hour and place as the directors may designate.

The secretary shall at least twenty days before the time of such meeting, cause notice thereof to be deposited in the post-office in New York city, directed to the address of each member, as the same appears on the books of the association.

SEC. 2. The meeting of the subscribers as incorporators shall constitute the first general meeting of the shareholders at which the first board of directors shall be chosen. The first year of the association shall terminate on the 31st day of March, 1889; and thereafter the association year shall end on the 31st day of December.

SEC. 3. Stated meetings of the shareholders may be called by order of a majority of the directors; notice of which meetings must be given for the time and in the manner as provided in section 1 of this article.

SEC. 4. Each member of the association not in arrears shall be entitled to one vote, and but one vote, at all general and stated meetings. Fifteen shareholders personally present shall constitute a quorum for the transaction of business. Shareholders may delegate their votes to a proxy, who must also be a shareholder. The instrument appointing a proxy must be deposited with the secretary not less than ten days before the date of the meeting. A majority of the votes cast, except upon the question of amending the articles of association, shall determine the result, provided that the aggregate nember of votes cast shall not be less than one hundred. All

elections shall be by ballot, and the person receiving the highest number of votes shall be declared elected.

ARTICLE 4.

Board of Directors.

SECTION 1. The management of the association shall be vested in a board of directors, all of whom must be shareholders of the association. The first board shall consist of seven of the corporate
39 members, who shall hold office until their successors are elected. At the general meeting of the association held on the third Wednes*ady* of April, 1890, and at each general meeting thereafter, one director shall retire from office. The board shall before said general meeting of 1890, determine the order of retirement by lot. After the seven original directors shall have retired, at each general meeting thereafter, the director who shall then have been longest in office shall retire. Retiring directors shall be eligible for re-election. Upon any vacancy occurring in the board of directors, the board of directors shall choose a shareholder to fill such vacancy until the next general meeting. Regular meetings of the board of directors shall be held on the second Thursday of each month. Special meetings of the board of directors may be called at any time by the president, the vice-president in the absence of the president, or any three of the directors, on not less than twenty-four hours' notice in writing by mail. A majority of the board of directors shall constitute a quorum for the transaction of business. The board of directors may make and adopt by-laws not inconsistent with these articles of association.

SEC. 2. The board of directors may appoint a general advisory board and local advisory board from among the shareholders at such places as they may deem best.

ARTICLE 5.

Officers.

SECTION 1. The officers of the association shall be a president, a first vice-president, second vice-president, a secretary and general manager, a general attorney and a treasurer, who shall be selected from the board of directors, and must all be shareholders. The officers shall be elected by the board of directors at their first regular meeting after the general meeting of the association in each year, and shall hold office for one year or until their successors are elected and qualified. Any vacancy occurring in any of the offices of the association, may be filled by the board of directors until the next regular meeting of the board of directors for the election of officers.

Any officer of the association may be removed from office for misconduct or neglect or violation of the duties of his office by a two-thirds vote of the board of directors.

The board of directors shall fix the salaries of all officers.

40 SEC. 2. The president shall preside at all meetings of the association and of the board of directors, issue orders to the

secretary for calls of meetings, sign all certificates of shares and agency appointments, countersign all checks, shall have the custody of the official bonds given to the association, and perform all other duties usually pertaining to the office of president. And he shall appoint at the meeting of the board of directors next preceding each general meeting of the association, three shareholders (not members of the board of directors) as an examining finance committee, who shall make an examination of the books, accounts, and vouchers of the secretary and treasurer, and report upon the same at the next general meeting. The president shall be a member *ex-officio* of all committees, except the examining finance committee.

SEC. 3. The first vice-president shall be chairman of the executive committee. In the absence of the president, he shall have the full powers and responsibility of the president, and perform his duties as "acting president."

The second vice-president shall perform the duties of the president in the absence of both the president and the first vice-president.

SEC. 4. The secretary shall be the general manager of the association, attend all meetings of the shareholders, the board of directors, and the executive committee. He shall keep all accounts fully and accurately, as well of the association as between the association and the shareholders, have the custody of the records and seal, issue all notices on the orders of the president or vice-president, sign all certificates of shares and agency appointments, and have the general management of the business of the association.

SEC. 5. The general attorney shall be the legal adviser of the directors and the counsel of the officers of the association, and have professional charge of the law business of the association. He shall examine the securities on all applications for loans, and no loan shall be made where the title of the security offered shall not be first approved by him. All checks upon the trustee, and all papers relating to loans, must be first approved by the general attorney.

SEC. 6. The treasurer shall receive and have the custody of
41 all the moneys of the association, turn over, at least fortnightly, to the trustee of the loan fund, all moneys of the association belonging to the loan fund, and shall disburse, only upon proper vouchers signed by the secretary and countersigned by the president, the moneys of the expense fund belonging to the association. He will be required to give bond for the faithful discharge of his official duties, to the association, in such amount as shall be fixed by the board of directors.

ARTICLE 6.

Executive Committee.

There shall be a standing committee to be known as the executive committee which shall consist of the first vice-president, the general attorney and the secretary. The executive committee shall examine all applications for loans, judge of the sufficiency of the securities offered, audit and pass upon all claims against the associ-

ation, and have full charge and supervision of the business of the association between the meetings of the board of directors.

ARTICLE 7.

Trustee.

The board of directors shall select a trust company doing business in the city of New York, to act as trustee for the association. The trustee shall receive, hold, and have the custody of all the moneys of the loan fund, and shall disburse the same, only upon proper vouchers and checks signed by the secretary, president and treasurer, and endorsed or countersigned by the general attorney, in strict compliance with such contract as may be made between the association and the trust company as trustee.

ARTICLE 8.

Shares.

SECTION 1. The capital of the association, to be accumulated, shall be fifty million dollars, divided into shares of the maturity value of $100 each, and shall be known as instalment shares, paid-up shares and interest-bearing paid-up shares.

SECTION 2. *Instalment Shares.*—Instalment shares shall be issued in monthly series, and shall be dated the first business day of the month, and shall be due and become payable whenever the
42 amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares.

SEC. 3. *Paid-up Shares.*—Paid-up shares of the par value of $100 will be issued for $50 per share. Such shares shall be liable for no further dues or assessments, and will be payable at the maturity of, and in the same manner as instalment shares of the same date.

SEC. 4. *Interest-bearing Paid-up Shares.*—Paid-up shares of the par value of $100 will be issued for $70 per share, upon which there will be paid to the holder semi-annually, from the earnings of the share, interest at the rate of 6 % per annum, upon the purchase price. Such shares shall be liable for no further dues or assessments, and will be payable at the maturity of, and in the same manner, as instalment shares of the same date.

SEC. 5. Paid-up shares and interest-bearing paid-up shares shall be issued in semi-annual series, and shall be dated the first business day of January and July. All profits to the loan fund shall be apportioned quarterly up to the first days of January, April, July and October of each year.

No shareholder can hold less than five, nor more than three hundred instalment shares, and no shareholder can hold more than two hundred paid-up shares, or interest-bearing paid-up shares. Every applicant for shares shall pay an entrance fee of one dollar for each share taken.

ARTICLE 9.

Stop Shares.

Any member holding unpledged instalment shares, and having paid one year's dues or more, may surrender his certificate to the association, and receive instead a certificate stating the number of months' dues paid, the date and issue, and the number of shares of the original certificate, and entitling him to receive at the maturity of the original issue such proportion of one hundred dollars per share, as the total number of months' dues paid shall bear to the total number of months from the date of the original certificate to the date of maturity.

ARTICLE 10.

Dues.

The monthly dues on each instalment share shall be sixty cents per month, and must be paid on or before the last business
43 day of each month until the maturity of the shares.

ARTICLE 11.

Fines and Forfeitures.

SECTION 1. A fine of ten cents will be charged on each share for each and every month such share may be in arrears for non-payment of dues, interest, or premium.

SEC. 2. In the event any shareholder holding unpledged shares shall be six months in arrears at any time, for dues thereon, the secretary shall cause to be personally served upon him a notice showing said shareholder's arrearages upon said shares, and requiring him to pay said arrearages within sixty days from the service of notice, or his shares, and all dues paid and profits accrued thereon, will be forfeited to said association; or a publication of said notice in a newspaper published in the city of New York, once in each week for six successive weeks shall be deemed equivalent to a personal service of said notice, and the sixty days within which said defaulting shareholder may pay up his arrearages in case of service by publication, shall commence on the day of the last publication; and in the event such defaulting shareholder shall not pay up the said arrearages within the sixty days aforesaid, the board of directors at any meeting thereof, by a majority vote, may declare such defaulting shareholder's unpledged shares forfeited to the association, and all payments and profits thereon.

ARTICLE 12.

Loans.

SECTION 1. The loan fund of the association shall consist of fifty cents of the monthly dues paid in on each share, interest, premiums, fines, and forfeitures, and the profits derived therefrom, and shall be

loaned to members of the association by the board of directors upon approved applications for loans in the order in which they have been filed.

SEC. 2. Interest at the rate of not more than six per cent. per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month until the maturity of the pledged shares, and a premium of not more than fifty cents per month will be charged on each one hundred dollars borrowed, which premium must be
44 paid on or before the last business day of each month, for a period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for the first six months to be paid in advance.

SEC. 3. A member may pay such loan at any time after one year, on giving thirty days' notice in writing to the secretary, upon the payment of the amount borrowed, with interest and premium thereon, and a redemption fee of fifty cents per share. No redemption fee shall be charged on matured shares.

SEC. 4. All loans on real estate must be amply secured by first mortgage on the property offered as security, and not to exceed sixty per centum of the cash value of such security. Each applicant for a loan shall submit to the association a full description of the property offered as security, and such other information as may be required by the regular forms of the association prepared for such purpose; he shall secure the payment of such loans, with interest and premiums, by promissory notes, bonds mortgages, deeds of trust, or such other instruments as may be required by the general attorney, executive committee, or the board of directors; and for every loan of one hundred dollars he shall, in addition thereto, transfer to the association as least one share thereof, as collateral security.

The applicant for a loan on real estate security must deposit with the association the sum of ten dollars, to cover the expense of appraisement of the security offered, and so much thereof as may not be required for such purpose will be returned to the applicant; he will also be required to furnish an abstract of title, accompanied by the certificate of a local attorney selected by the association, or a title insurance policy whenever feasible, or such other proof, showing a clear and undisputed title to the property, as the general attorney may require. Any other necessary charges will be deducted and retained from the amount borrowed. The borrower must pay and keep paid all taxes, assessments, and insurance on the property, and will be required to furnish the vouchers of payment, or satisfactory evidence thereof to the secretary during the continuance of the loan.

SEC. 5. Any borrower who may be three months in arrears for dues, interest, or premium, will be liable to the immediate foreclosure of his security, and it shall be the duty of the general
45 attorney, upon receipt of notice of such delinquency from the secretary, to proceed without delay to enforce the payment of

the full indebtedness, unless otherwise ordered by the executive committee or the board of directors.

ARTICLE 13.

Loans on Shares.

Any member can borrow on his shares ninety per cent. of the withdrawal value thereof, upon executing and delivering to the association such note, bond or other instrument as the board of directors may require, together with an assignment of the shares as security. Interest and premium on such loans will be the same as in the case of a loan on real estate security, and the loan may be repaid in the same manner and on the same terms, but no redemption fee will be charged on such loans.

ARTICLE 14.

Residue of Loan Fund.

The residue of the loan fund not required by shareholders, may be invested in such securities as the laws of New York permit for the investment of saving banks' deposits.

ARTICLE 15.

Withdrawals.

SECTION 1. Any member may, after one year, withdraw one or more of his unpledged investment shares by giving to the secretary at least thirty days' notice in writing, when he will be entitled to receive as follows:

After one year, the amount of monthly dues paid into the loan fund on each share (being fifty cents of the monthly dues), together with interest thereon, payable from the earnings of said shares, at the rate 6 % per annum; after three years, the amount paid into the loan fund and one-half of the profits to the credit of the shares as per last apportionment; after five years, the amount paid into the loan fund and two-thirds of the profits to the credit of the shares as per the last apportionment, less in every case any arrearages on the shares and a withdrawal fee of one dollar.

SEC. 2. Any member may at any time after two years withdraw one or more of his paid-up (non-interest-bearing) shares by giving to the secretary at least thirty days' notice in writing, when he will be entitled to receive the purchase price of the shares, to-
46 gether with interest thereon payable from the earnings of said shares at the rate of 6 % per annum for the first three years, and at the rate of 7 % per annum thereafter, less a withdrawal fee of one dollar.

SEC. 3. Any member may at any time after two years withdraw one or more of his paid-up interest-bearing shares by giving to the secretary at least thirty days' notice in writing, when he will be entitled to receive the purchase price of the shares, with interest due thereon, less a withdrawal fee of one dollar.

SEC. 4. At no time shall more than one-half of the monthly dues received in any one month for the loan fund be applicable to the demand of withdrawing members, without the consent of the board of directors.

ARTICLE 16.

Transfer of Shares.

Any member may transfer unpledged shares which are not in arrears for dues upon the payment of a transfer fee of one dollar for each certificate, but no transfer shall be valid without the endorsement of the secretary upon the certificate of shares. Shares on which a loan has been made can be transferred (subject to the lien of the association thereon) only to a grantee of the mortgaged property, and provided all dues on said shares and interest and premium on said loan, are paid.

ARTICLE 17.

Expense Fund.

The expense fund of the association shall consist of ten cents per share of the monthly dues paid on instalment shares, twelve and one-half cents per share per month on paid-up shares, and fifteen cents per share per month on interest-bearing paid-up shares, and transfer, withdrawal, and redemption fees.

ARTICLE 18.

Death of Members.

Upon the death of a shareholder his legal representatives may give written notice to the secretary of their intention to withdraw his instalment shares, and there will be paid, upon the surrender to the association of the certificate of shares, the withdrawal
47 value of said shares, as provided in section 1 of article XV; but no withdrawal fee will in such case be charged.

No fines will be charged on the shares of a deceased shareholder for the first three months after his death.

ARTICLE 19.

Amendment of Articles.

These articles of association may be altered or amended at any general or stated meeting of the association, by a two-thirds vote of all the shareholders present at such meeting, in person or by proxy, and entitled to vote.

STATE OF NEW YORK, }
City and County of New York, } ss:

I, William J. McKenna, clerk of the city and county of New York, and also clerk of the supreme court of the said city and county, being a court of record, do hereby certify, that the certificate en-

dorsed "Certificate of amendment of articles of association of the National Mutual Building and Loan Association of New York" was filed and recorded in this office on this 21st day of April 1892.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 21st day of April 1892.

[SEAL.] WM. J. McKENNA, *Clerk.*

National Mutual Building and Loan Association of New York.

Certificate No. 10190; issue, E 5; shares, 25; loan No. 1180; amount, $2,500; date, May 21st, 1892.

Mr. Frank V. Brahan, Meridian, Miss.

DEAR SIR: Please make payments as stated below.

Year.	Months.	Dues.	Premium.	Interest.	Total.
1892.	May	15.00		3.75	18.75
	June	15.00		12 50	27.50
48	July	15.00		12.50	27.50
	Aug	15.00		12.50	27.50
	Sept.	15.00		12.50	27.50
	Oct	15.00		12.50	27.50
	Nov	15.00	12.50	12.50	40.00
	Dec	15.00	12.50	12.50	40.00
	Jan'y	15.00	12.50	12.50	40.00

and $40.00 each succeeding month.

6% per annum average time will be allowed on all advance payments on dues of six or more months.

Payments must be made on or before the last business day of each month in order to avoid fines.

Respectfully yours, GEO. R. SUTHERLAND,
Secretary and General Manager.

National Mutual Building and Loan Association of New York.

Certificate No. 10190; issue E 5; shares, 20; loan No. 2759; amount, $2,000.00; date, Aug. 30th, 1894.

Mr. Frank V. Brahan, Meridian, Miss.

DEAR SIR: Please make payments as stated below.

Year.	Months.	Dues.	Interest.	Premium.	Total.
1894.	Sept	12.00	10.00	10.00	32.00
	Oct	12.00	10.00	10.00	32.00
	Nov	12.00	10.00	10.00	32.00

and $32.00 each succeeding month.

6% per annum average time will be allowed on all advance payments on dues of six or more months.

49 Payments must be made on or before the last business day of each month, in order to avoid fines.

Respectfully yours,

GEO. R. SUTHERLAND,
Secretary & General Manager.

$1,473.96. NEW YORK, *March* 2, 1897.

Pay to the order of First National Bank, Meridian, Miss. fourteen hundred and seventy-three $\frac{96}{100}$ dollars with current rate of exchange on New York, value received and charge to account of

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
By GEO. R. SUTHERLAND, *Sec't'y.*

To F. V. Brahan, No. — Meridian.

[Written across the face:] P/D 3/8/99. F. V. Brahan. Paid March 8, 1897. First Nat'l Bank M'd'n, Miss. exchange department.

And the defendant gave in evidence on its behalf as follows:

50 In the Circuit Court of Lauderdale County, Miss., October Term, A. D. 1899.

F. V. BARHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION of New York. } 43/5324.

Depositions of William Gibson and George J. Peet in answer to interrogatories and cross-interrogatories hereto annexed, taken by Vincent Rosemon, notary public for New York county, at No. 320 Broadway, New York city, the second day of October, 1899, under and in pursuance of a commission hereto annexed.

Int. 1. State your name, age and place of residence.

WILLIAM GIBSON being duly sworn, in answer to the first interrogatory, says:

My name is William Gibson, I am 55 years of age and reside in the city of New York.

Int. 2. State what connection, if any, you now have with the defendant association, how long you have been connected with the defendant association and in what capacity.

Ans. 2. From October, 1889 to May 13th, 1898, continuously, I was the director of agencies of the defendant association. That since May 13th, 1898 I have been, and still am, the secretary and general manager of said association.

Int. 3. State whether or not you were familiar with the management and business of the defendant association during the plaintiff, F. V. Brahan's, connection with the association, beginning in the month of May, 1892.

Ans. 3. That as such director of agencies and as such secretary and general manager I have been continuously at the office of the association in the city of New York since the month of October, 1889, and am familiar with all branches of the business of said association during that time.

Int. 4. State under what act or law the defendant association was incorporated, and when and where is its domicile, or principal place of business.

51 Ans. 4. That the defendant association was incorporated under chapter 122 of the Laws of the State of New York, passed April 10th, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations" and the acts amendatory thereof, to-wit: Chapter 564 of the Laws of New York, passed June 9th, 1875, and chapter 96 of the Laws of New York, passed April 1st, 1878, and was so incorporated on or about the 19th day of April, 1888, and its domicile and principal place of business is, and always has been in the city of New York in the State of New York.

Int. 5. State whether or not in the month of May, 1892, or at any other time, the defendant association had a branch office in the city of Meridian, Mississippi, for the purpose of lending money in the State of Mississippi.

Ans. 5. That neither in the month of May, 1898, or at any time before or since that date has the defendant association had a branch office in the city of Meridian, Mississippi, for the purpose of lending money in the State of Mississippi. That it never has had any such office anywhere except its principal office in the city of New York.

Int. 6. State whether or not the defendant association in May, 1892, and afterward, had an agent or agents in the city of Meridian, and, if so, state who they were and the scope of their agency.

Ans. 6. That in and prior to May 1892, the defendant association had, and still has, an agent in the city of Meridian, Mississippi; that in the month of May 1892 such agents were the firm of Woods & Carter, and in 1894 they were the firm of Woods, Lott & Broach. The authority of such agents was, and is, to receive and forward to the office of the association in the city of New York, applications for shares, and applications for loans, and to receive and receipt for the dues on shares and the interest and premium on loans, but such agents have never had any power or authority to grant or make loans, or to make any representations in respect to loans.

Int. 7. State who, under the articles, rules and regulations
52 of defendant association were then and are authorized to grant loans to borrowing stockholders.

Ans. 7. That under article VI. of the articles of association, the executive committee of the association, consisting of the first vice president, the secretary, and the general attorney, alone has, or ever had, authority to pass upon the applications for loans, and all loans that have ever been granted by the association have been granted by such committee.

Int. 8. State whether or not the plaintiff, F. V. Brahan, became, or was at any time, a member or shareholder of the defendant asso-

ciation, and, if so, state when he became a member, and how many shares of stock he subscribed for, or owned.

Ans. 8. The plaintiff, F. V. Brahan, became a member and shareholder of the defendant association in the month of May, 1892, when twenty-five shares of the association were issued to and received by him.

Int. 9. Please produce before the commissioner the original articles of association of the defendant that were in force in May, 1892, when the first loan to plaintiff was applied for and granted, and attach a true copy thereof to your deposition, marking the same Exhibit "1", and state whether or not the same articles of association were in force when the second loan was applied for and granted plaintiff in August, 1894, and when the defendant paid off his loan and ceased to be a member of the association in March 1897.

Ans. 9. The original articles of defendant association that were in force in May 1892, are filed and recorded in the office of the clerk of the city and county of New York, and cannot be produced by witness, but he does produce before the commissioner a copy of said articles certified by the clerk of the city and county of New York, and attaches a true copy thereof to this deposition, marking the same Exhibit "1." And said articles were the articles in force when the second loan was applied for and granted by the plaintiff in August 1894, but that said articles were not the articles in force when the plaintiff paid off his loan and ceased to be a member
53 of the association in March, 1897, but that the articles were amended in April 1896, and that such original amended articles are also filed and recorded in the office of the clerk of the city and county of New York. That the witness has produced before the commissioner, a certified copy of such amended articles, and attaches to this deposition a true copy, marking the same Exhibit "1A".

Int. 10. State whether or not plaintiff made written application for his stock in defendant association in or about May, 1892, and if said application was in writing, please produce the same, give its date and have it identified by the commissioner by marking it "Document 1, identified" on the margin.

Ans. 10. The plaintiff did make a written application to the defendant association for stock in and about May, 1892, that said application was dated the 30th day of April, 1892, and the same is produced before the commissioner and is by him marked "Document 1 identified."

Int. 11. State whether or not the application for said first loan and said second loan of plaintiff were in writing, and to whom they were made; and, if they were in writing, please produce them, and give their respective dates, and have them identified by the commissioner by marking them on the margin "Document 2, identified" and "Document 3, identified" respectively.

Ans. 11. The application for the first loan, and the application for the second loan were both in writing, and they were made to the association at its office in the city of New York. The first application was dated the 30th day of April, 1892, and was for $2500. The

witness produces the same before the commissioner, who marks the same "Document 2 identified." The second application was for a loan of $2000. and was dated the 6th of June, 1894, but this application the executive committee did not grant, but required the applicant, the plaintiff in this case, to include the other lots as security for the loan, and he did make a further applica-
54 tion, dated June 20th, 1894, including additional property, and these two applications form one application for a loan of $2000., and the same are attached together and are produced before the commissioner and by him identified by marking on the margin thereof "Document 3 identified."

Int. 12. State how these applications came into the hands of the association, and whether or not the loans therein applied for were granted, and, if so, by whom they were granted.

Ans. 12. These applications were sent to the association in the city of New York by Woods & Carter, and by Woods, Lott & Broach. After the receipt of these applications at the office of the association, the proper officers corresponded with the plaintiff in reference thereto, and after due consideration by the executive committee they were granted by said committee.

Int. 13. State what, if anything, your agents at Meridian, Mississippi, had to do with the granting or consummation of these loans, or either of them, after the applications were forwarded by them to defendant association.

Ans. 13. The agents of the association at Meridian, Mississippi, had nothing to do with the granting or consummation of either of the loans made to the plaintiff in this case after the applications were forwarded by them to the defendant.

Int. 14. State what papers or instructions the plaintiff, F. V. Brahan, executed to the defendant association, evidencing his contract in each of said loans.

Ans. 14. F. V. Brahan in each of said loans executed to the defendant association a bond, a mortgage and an assignment of his shares.

Int. 15. If you say that in each of said loans plaintiff executed to defendant association a bond, assignment of shares and mortgage, state whether or not defendant still has in its possession any of said original papers, and, if not, state what disposition was made of them.

Ans. 15. The defendant still has in its possession the orig-
55 inal mortgage and the original assignment of shares given to secure said first loan, and the original assignment of shares given to secure the second loan. The original bond in the first loan was sent to said Brahan by the defendant at the time said loan was repaid, and the original mortgage and bond in said second loan was sent to said Brahan by said defendant at the time said second loan was repaid, and none of said papers so sent to said Brahan have been returned by him to the association.

Int. 16. If said original bonds and assignments in said two loans are not in the hands of defendant association, please attach if possi-

ble copies thereof as Exhibits "2," "3," "4" and "5" to your deposition.

Ans. 16. Deponent attaches to this deposition a copy of the bond and the original assignment of shares in the first loan, and a copy of the bond and the original assignment of shares in the second loan, marking them respectively Exhibits "2," "3," "4" and "5."

Int. 17. State whether or not there was any agreement or understanding between the plaintiff, F. V. Brahan, and the defendant association, that either of his said contracts was made in the State of Mississippi, and was to be performed in the State of Mississippi.

Ans. 17. No.

Int. 18. Please state whether or not it was agreed and understood between the plaintiff and defendant that the plaintiff Brahan should make all his payments, agreed by him to be paid, to the agent of defendant at Meridian in the State of Mississippi.

Ans. 18. There was no such agreement or understanding between the plaintiff and defendant.

Int. 19. State by what authority the plaintiff Brahan made payments of interest, premium and dues to the agent of defendant at Meridian Mississippi.

Ans. 19. The plaintiff Brahan made payments of interest, premium and dues to the agent of the association at Meridian by the authority and permission of the defendant association.

Int. 20. State whether or not there was any agreement or
56 understanding between the plaintiff Brahan and the defendant association that the defendant should maintain an agent at Meridian to whom payments might be made by him.

Ans. 20. There was no such agreement or understanding between the plaintiff and the defendant.

Int. 21. State whether or not while the defendant had an agent at Meridian, Mississippi, there was any requirement that the plaintiff should make his payments to said local agents instead of to the association direct, as provided in the contract.

Ans. 21. At no time was there any agreement that the plaintiff should make his payments to any agent of the association instead of to the association direct, as provided in the contract. That he was permitted to make such payments, but not required to do so.

Int. 22. State whether or not the defendant in said instrument provided that said sums loaned, with interest, premium and dues, were to be paid to the defendant association at its office in the State of New York with intent to evade the usury laws of the State of Mississippi.

Ans. 22. The association did not provide in said contract that the sums loaned, with interest, premium and dues, were to be paid by the defendant association at its office in the State of New York, with any intent to evade the usury laws of the State of Mississippi.

Int. 23. State the reason and purpose for inserting in the bond, assignment of shares and mortgage the provision that all payments were to be made to the defendant association at its office in the city of New York.

Ans. 23. The provisions in the contract, making the same payable at the office of the association in the city of New York, were inserted therein because the association is a New York corporation, and was organized and incorporated for the purpose of making loans in the State of New York, but with power to extend its operations to other States, and that its first loans were made in the State of New York, and the terms of payment requiring all payments to be made in the State of New York were then adopted in the form of
57 mortgage first used, and when the association began to extend its operations to other States, the same form which it had been using in the State of New York was followed in making loans in all other States, and because it was essential to the safe and prudent conduct of the affairs of the association that all payments should be made to the association at its office in the city and State of New York, and in order that its contracts should have a uniform interpretation.

Int. 24. State how the sums loaned to said Brahan were paid to him.

Ans. 24. Checks for twenty-five hundred dollars ($2500.00) on said first loan, and for two thousand dollars ($2000.00) on said second loan were drawn by said National Mutual Building and Loan Association of New York to the order of said Frank V. Brahan on the Mercantile Trust Company of New York on the 21st day of May 1892, and on the 30th day of August 1894, respectively, and were, on the respective dates thereof, sent to Meridian to be delivered to the said Frank V. Brahan on his properly executing the bond, mortgage and assignment of shares on each loan, which were prepared at the office of the said association at New York and sent to Meridian with the checks. These checks were endorsed by said Brahan and after such endorsement by him were paid by the Mercantile Trust Company at the city of New York, and after such payments were returned to the defendant association.

Int. 25. Examine the copy herewith shown you of the bill of particulars, Exhibit "A" to plaintiff's declaration, and state whether or not the same contains a correct statement of the payments made by the said Brahan to the defendant association, and if not, state wherein the same is incorrect; and in this connection, please state what payments were made the association by the plaintiff, Brahan, giving the dates and amounts.

Ans. 25. I have examined the copy of the bill of particulars Exhibit "A," attached to plaintiff's declaration, and the same does not contain a correct statement of the payments made by the
58 said Brahan to the defendant association. The item of $18.75 stated as paid in May 1892 is correct; the item of $137.50 stated to have been paid for five months from June to October 1892, inclusive, at $27.50 per month is also correct. The item of $560.00 stated to have been paid at $40.00 per month from November 1892 to December 1893, both inclusive, fourteen months, is incorrect as Brahan did not pay dues, interest and premium for the whole of that time. The interest and premium on repayment of the first loan were calculated only to November 5th 1893, and he paid no interest

or premium from November 15th 1893 to January 1st 1894, and he here makes an incorrect charge for interest and premium from November 15th 1893 to January 1st 1894, amounting to $37.50 and which he never paid to the association. The correct amount paid by him for the period stated by him, was as follows:

Dues, interest and premium at $40. per month from November 1892 to October 1893, both inclusive, 12 months.....	$480.00
November and December 1893 dues.....	30.00
Interest and premium from November 1, 1893 to November 15, 1893.....	12.50
Total.....	$522.50

And this $522.50 is the correct amount paid by him for the period for which he charges $560.00 as paid in his bill of particulars. The item of $13.50 paid January 1894 is correct in amount but plaintiff is entitled to no credit on his loan, therefor; this amount is made up of redemption fee of $12.50 and of $1.00 notary fee on execution of release of mortgage given on first loan. The articles of association in force when the first loan was made, and also when it was repaid, required members paying off their loans before maturity to pay a redemption fee of 50 cts. per share, and this redemption fee went into the general profit account of the association and formed a part of the profits distributed among all the shares in force, and of this amount the plaintiff Brahan received his proportionate share when the profits were thereafter distributed among all the shares in force, including his shares, and his proportionate share of this
59 $12.50 was paid to and received by him when he withdrew his shares at a later date.

The item of $120.00 for dues at $15.00 per month on the shares from January 1894 to August 1894, inclusive, is correct in amount, but is incorrectly included in the bill of particulars, and of the $560.00 above referred to, $220.00 being for dues on fifteen shares for fourteen months at $15.00 per month from November 1892 to December 1893, inclusive, and also the dues for five months on said shares from June to October 1892, inclusive, at $15.00 per month, amounting to $75.00 are improperly included in the bill of particulars, because when Brahan withdrew his shares he received all that he was entitled to receive, to-wit: the withdrawal value of the said shares. Under the articles of association the said Brahan on withdrawing his shares could not receive their full value, as shown by the books, but only what is called their withdrawal value, and which is always less than the full value of the shares shown on the books. A member withdrawing his shares before their maturity surrenders to the association some part of the profits earned by his shares, and which profits so surrendered go to increase the value of the shares held by the other members. The $120.00 above referred to is also incorrectly included in the bill of particulars for the reason that it was paid after the first loan was repaid. This payment covered the dues on the shares from January 1894 to August 1894, inclusive,

and on the repayment of the first loan Brahan, as above stated, paid the interest and premium to November 15th 1893 only, and had also then paid the dues on the shares to January 1st, 1894. The item of $2611.00 stated in the bill of particulars to be paid as cash November 1893, is not correct, as that amount was not paid in full at that time. The defendant association at the request of said Brahan made up a statement for him which showed the amount required to pay off the loan in full without using the value of the shares, to be
$2611.00 on November 15th 1893. A fire had, prior to that
60 time, substantially destroyed the building on the property mortgaged by Brahan to the association, and he was entitled to receive from the insurance company $2500.00 for his fire loss. Brahan notified the association that he would pay off the loan in cash and retain his shares in force. I attach to this deposition his letter to that effect, dated November 7th 1893 and marked Exhibit "6."

The draft for the insurance loss was $2500.00 Brahan endorsed this draft to the association and caused it to be sent to the association in part payment of this amount in November 1893.

The amount due November 15, 1893, as per statement sent to Brahan was	2611.00
Of this amount the association credited the proceeds of the insurance company's draft	2500.00
Balance then due was	$111.00
The November dues which were not included in the $2611.00 were	15.00
Balance then due was	$126.00

The plaintiff Brahan paid this amount as follows:

On December 19th 1893	112.50
On January 17th 1894	13.50

The bill of particulars as to the first loan is also incorrect in that plaintiff Brahan attempts to credit dues on shares and interest and premium on the loan claimed to have been paid by him as a payment on the principal of the loan when under his contract, as contained in his bond and mortgage, the interest and premium could be credited only in payment of interest and premium due on the principal of the loan, and the dues on shares paid by him, amounting to a total of $780.00, could be credited to him only in the manner provided for in the articles of association and not on the principal of the loan, as these dues were paid by him for the purpose of maturing the shares, and under the articles of association, the share fund making up the value of his shares at any time was made up of five-sixths of the amount paid for dues on said shares with profits earned by and credited thereto, and the only credit to which said Brahan would be entitled for this $780.00 would be the value of the

shares, which was received by him when he withdrew the
61 same.

The plaintiff Brahan retained the twenty-five shares issued to him, until the month of October 1894, and at that time he voluntarily withdrew five of the shares and received what was their then withdrawal value, $73.90 and which was correctly made up under the articles of association, and according to the books of the defendant association as follows:

He had paid on these 5 shares, dues at $3. per month from May 1892 to August 1894, both inclusive, 20 months.....	84.00

Under the articles of association he was entitled on withdrawal of said shares to receive part of the value of the shares only, made up of five-sixths of the amount paid for dues on shares, with interest thereon for average time the same had been in the hands of the association, less any fines thereon and less withdrawal fee of $1.00. The withdrawal value of said shares so withdrawn by him was on October 3d, 1894, correctly made up as follows:

⅚ of $84.00 dues paid thereon	70.00
Interest thereon for average time.....	4.90
Total.....	74.90
Less withdrawal fee of.....	1.00
Withdrawal value of said 5 shares Oct. 1894.....	73.90

and this amount was paid to said Brahan by the defendant association in October 1894.

The statement of amount required to pay off the first loan on November 15th 1893, was made up as follows:

Principal of loan	2500.00
Redemption fee.....	12.50
Interest to Nov. 15th, 1893, 2½ months.....	31.25
Premium for September and October 1893 and from Nov. 1st 1893 to Nov. 15, 1893.....	31.25
Dues for September and October 1893.....	30.00
Fines.....	5.00
Notary fee.....	1.00
Total amount.....	$2611.00

62 The bill of particulars as to the first loan is also incorrect in charging the total of the $2611.00 as a cash payment, when, as will be seen, this $2611.00 includes,

Interest	31.25
Premium	31.25
Dues	30.00
Total	$92.50

which has already been charged by Brahan in his bill of particulars as a part of the $560.00, and this $92.50 of the $2611.00 was, when received by the association credited in payment of the interest and premium from September 1st to November 15th 1893, and in payment of the dues on shares for September and October 1893, and the defendant association did not receive payment of said dues, interest and premium amounting to $92.50 *at any time or in any other* way than from the $2611.00 received from Brahan on repayment of the first loan. So that he makes a double credit in his bill of particulars for $92.50. The bill of particulars is also incorrect in attempting to show that there was an excess paid, in paying off the loan, of $960.75. There was no excess paid on said loan and the amount which Brahan paid to the association in discharge of the loan was the exact amount due on the loan for principal, interest, fines, redemption fee and notary fee and the amount paid on the shares $780.00 in the aggregate, was not paid on the loan, but was, as above explained, paid on the shares for the purpose of maturing the same, and Brahan received therefor all that he was entitled to receive when he withdrew the said shares.

The said bill of particulars is also incorrect as to the items alleged to have been paid on the second loan. Brahan did not pay thirty-one monthly payments of $32.00 each from September 1894 to March 1897, amounting to $992.00. He paid dues on 20 shares from September 18th 1894 to February 1897, both inclusive, 30 months at $12 ..... 360.00

Interest Sept. 1, 1894 to March 10, 1897 30 months and 10 days on $2000 ..... 303.33

63 Premium Sept. 1, 1894 to March 10, 1897 30 months and 10 days on $2000 ..... 303.33

Total $966.66

He erroneously credits himself with March dues 12.00

Interest March 10th to April 1, 1897 on $2000 ..... 6.67

Premium for same time 6.67

Total $25.34

which amount he did not pay to the association at any time.

The second loan was repaid on or about March 10, 1897, as per the following statement:

Due March 10, 1897, principal	2000.00
Redemption fee	10.00
Interest, Dec. 1/96 to March 1/97	30.00
Premium " " "	30.00
Dues, December 1896, Jan. & Feb. 1897	36.00
Fines	8.00
Notary fee	1.00
	$2115.00

Add ten days' interest and premium to March 10, 1897, at 66⅔ cts. per day	6.66
Fines for February 1897	2.00
Total amount due March 10, 1897	$2123.66
Withdrawal value of shares credited and applied thereon	649.70
Balance paid in cash on or about March 10th, 1897	$1473.96

Brahan erroneously credits himself with the full amount of $1473.96 as a cash payment in addition to previous payment, but from this $1473.96, when received at the association, the sum of $102.66 was used in paying the interest, premium and dues above shown, which were as follows:

Interest Dec. 1/96 to March 10/97	33.33
Premium " " "	33.33
Dues for December 1896, Jan. & Feb. 1897	36.00
Total	$102.66

which $102.66 has been already charged by Brahan as paid by him in his statement of alleged payments of $32.00 per month, claimed by him to amount to $992.00 so that there is here a double credit claimed by Brahan for a single payment of $102.56.

64 Said Brahan also erroneously credits himself in said bill of particulars with the value of 20 shares $649.70, as he has already credited himself with the full amount of the dues paid on these twenty shares in the credits claimed by him in that part of the bill of particulars relating to the first loan, wherein he credited himself with $137.50 and $560. and in the payments with which he credited himself with thirty-one monthly payments of $32.00 each, claimed to have been paid on the second loan. These credits include the dues paid on the twenty shares from May 1892 to February 1897, both inclusive, amounting to, $12.00 per month for 58 months, $696.00.

The said Brahan voluntarily used the withdrawal value of his twenty shares in part repayment of the second loan, which withdrawal value was correctly made up according to the books of the association, and under the articles of association then in force, and was $649.70. This was not the full value of the shares as shown by the books, but was what is called the withdrawal value, and which was all that the said Brahan was entitled to receive at the time of such withdrawal in March, 1897, under the articles of association, as a shareholder then withdrawing his shares received, under the articles of association, only the withdrawal value of the shares and not the full value. This withdrawal value was made up, under the articles of association, by taking five-sixths of the dues paid on said shares, and crediting thereon profits earned by said shares, and deducting all fines unpaid thereon, and a withdrawal fee of $1.00.

Said Brahan in this action attempts to repudiate the contract which he made with the association, and to have all payments made by

him credited as a repayment on the principal of the loan, and he then attempts to claim benefit of that part of the contract made by him with the association, under which his shares were progressing in value towards maturity, and having paid on his twenty shares $696.00 for dues which he asks to have credited as a payment on the principal, and which could not be so credited on the principal under the terms of the contract, he then attempts to enforce so much of the contract as he thinks to be to his own advantage by asking that he be credited with the withdrawal value of his twenty
65 shares $649.70, which value was used by him as a part payment of the amount due when he repaid the second loan.

Under the contract made by Brahan, the dues paid on his shares were to be used and disposed of as follows: Five-sixth of the amount was to be credited to his share account and to form the fund to be invested for his benefit toward maturing the shares; one-sixth of the amount so paid for dues, was to be paid into the expense fund of the association to be used for the expenses of the business and under the articles of association and the rules governing its business, the said Brahan could use the value of the shares in payment or part payment of the loan, using the full value at maturity of the shares to repay the amount due, and using the withdrawal value of the shares which was less than their full value, if he wished to pay off the loan before maturity. The said Brahan elected to use the withdrawal value of his twenty shares in part payment of the second loan, and so carried out his contract with the association, and now seeks to repudiate the contract and settlement made by him, and to receive a double credit by asking credit for the $696.00 dues, which he paid on his shares, five-sixths of which dues made up the greater part of the value of his shares, and then asks to receive credit for the withdrawal value of his shares, made up for the greater part by the five-sixths of the dues paid thereon. I have had a detailed statement made up from the books of the association showing all payments of interest and premium on the two loans made by the association to said Brahan, and also of all dues and fines paid by him on his twenty-five shares in certificate No. 10190, and which is attached to this deposition and marked Exhibit "7." This statement shows, among other things, certain fines which were imposed for the months of September and October 1893 on his twenty-five shares, and which amounted to $5.00 and fines for January, August and November 1895, February and December 1896, and January and February 1897, and which amounted to $14.00. These fines were imposed under the articles of association because the payments of dues, interest and premium for these months were not paid until after the expiration of each of said months. The contract provided that such dues, interest and premium should be payable monthly, and
66 the articles of association authorized said association to charge a fine of ten cents per month on each share in case this interest and premium and dues payable in such month are not paid until a later date. A part of the dues, interest and premium shown in this statement, was paid from the $2611.00 paid by Brahan when he repaid the first loan, and from the $1473.96 paid by him in cash

when he repaid the second loan, as already explained. The said statement correctly shows the dates at which the payments therein set out were received at the office of the association in the city of New York, and how the same were applied.

The total amount paid for dues on shares, fines on same and interest and premium on the two loans, was $1850.66 as shown in the said detailed statement marked Exhibit "7." This is made up as follows:

Total dues on shares in certificate 10190 which was issued to said Brahan and pledged by him on said loans	780.00
Fines on same	19.00
Interest paid on the two loans	525.83
Premium paid on the two loans	525.83
Total	$1850.66

Brahan made cash payments which were received by the association in part payment of said first loan as follows:

November 17th 1893	2500.00
December 19th 1893	112.50
January 17th 1894	13.50
Total	$2626.00

$112.50 of this $2626.00 to-wit:

Interest	31.25
Premium	31.25
Dues, September, October and November 1893	45.00
Fines	5.00

is included in the said $1850.66 shown in said detailed statement and was used to pay dues, interest, premium and fines to that amount. $12.50 of this $2626.00 was for redemption fee on 25 shares on repayment of first loan, and $1.00 was for notary fee on release of mortgage on said loan. Said Brahan made a cash payment
67 in March 1897 of $1473.96. $112.66 of this $1473.96 is included in the $1850.66 shown in said statement and was used to pay dues, interest, premium and fines to that amount as follows:

Interest	33.33
Premium	33.33
Dues, Dec. 1896, Jan. & Feb. 1897	36.00
Fines	10.00

$10.00 of said $1473.96 was used in payment of redemption fee on 20 shares on payment of second loan, and $10.00 thereof was for notary fee on release of mortgage on second loan.

The bill of particulars as to the second loan is also incorrect in that the plaintiff Brahan attempts to credit dues on shares, and interest and premium on the loan claimed to have been paid by him, as a payment on the principal of the loan, when under his contract,

as contained in his bond and mortgage, the interest and premium could be credited only in payment of interest and premium due on the principal of the loan, and the dues *on* the shares paid by him could be credited to him *only* in the manner provided for in the articles of association and not on the principal of the loan, as these dues were paid by him for the *purpose* of maturing the shares, as already explained. The bill of particulars is also incorrect in attempting to show that there was an excess paid in paying off the second loan of $1115.66. There was no excess paid on said loan, and the amount which Brahan paid to the association in discharge of the second loan was the exact amount due on the loan for principal, interest, premium, fines, redemption fee and notary fee, after first applying the withdrawal value of the 20 shares, $649.70, pledged thereon, in part payment of said second loan.

Int. 26. State whether or not all these payments were made by the plaintiff Brahan to the defendant's agent at Meridian, Miss. and, if not, state which of them were made to the association at New York.

Ans. 26. The payments made, as stated in my answer to the twenty-fifth interrogatory were not all made at Meridian. The greater part of them were made at New York. All the payments of dues, interest, premium and fines, were made to the agents of the defendant at Meridian, Mississippi, except the $112.50 thereof
68 which were paid at New York from the proceeds of draft for $2500.00 there received, and except the $112.66 which was paid at New York from proceeds of draft for $1473.96. The $2500.00 received by the association in November 1893, was paid by a draft drawn by J. C. Lloyd & Company, insurance agents of Meridian, on the Hanover Fire Insurance Company of New York, which was drawn to the joint order of said association and said Brahan and was endorsed by said Brahan and sent to said association by said insurance agents, and was paid to said association at New York by the said Hanover Fire Insurance Company. The $1473.96 received by the association on March 11th 1897 in part payment of said second loan was paid to the association at New York by a draft drawn to the order of said association by the First National Bank of Meridian on the National Park Bank of New York, dated March 8th 1897, which draft was paid to said association at the city of New York by the said National Park bank.

Int. 27. State whether or not the defendant association has always conducted its business in strict accordance with the articles of association.

Ans. 27. It has.

Int. 28. Please state the plan of the association, giving the court and jury as accurate an idea as possible of the mode of granting and making loans, upon what terms, how secured, as to what becomes of the payments by borrowers and other stockholders, how the association obtains funds to lend its borrowers, and how loans are repaid, and of such other details as may seem to you material to a thorough understanding of this case.

Ans. 28. Loans are made only to members of the association. A

borrowing member is required to own and pledge one share of the maturity value of $100.00 for each $100.00 borrowed by him, and to pay the dues on each share of 60 cts. per month, and to pay interest at the rate of six per cent. per annum on each $100.00 borrowed, until the shares mature, that is, until the shares are
69 worth each $100.00, and to pay a monthly premium of 50 cts. on each $100.00 borrowed for not over eight years from the date of the loan, even though it takes longer than eight years to mature the shares. Five-sixths of the amount paid for dues on shares is credited directly on those shares, and the fund so formed with profits credited thereto eventually works the maturity of the shares, the other one-sixth of the dues is appropriated to the expense fund of the association. The profits are made up of the interest and the premium paid by all borrowers, the fines paid, and the difference between the withdrawal and holding value of shares, when shares are withdrawn before maturity, the withdrawal value of these shares always being less than their holding or book value. Profits may come to the association also from the sale of real estate that it may have acquired on foreclosure or from rentals of its real estate, and there are other like sources of profits.

All profits, from whatever source, go into one common fund and are apportioned quarterly to all shares in force according to their capital value. For example: A share that is worth $10.00 receives, one half as much of the profits on an apportionment, as a share that is worth $20.00, and a share worth $20.00 receives one half as much as a share that is worth $40.00, and so on. The loan fund is made up of five-sixths of the dues as aforesaid, and all profits of the association, and from this fund loans are made to the members who make the payments as above set out. No payments so made can be credited on the principal of the loan, and the amount due the association at any time on a loan, is the principal sum as stated in the mortgage, with any accrued interest and premium thereon, and any amount that may have been paid by the association for insurance, or taxes &c.

When the shares become worth $100.00 each, their value is applied under the contract, in repayment of the principal sum borrowed, on their being surrendered to the association, the maturity value of each share, to wit: $100.00, thus repaying $100.00 on said principal sum but no credit can be made on the principal sum, nor is such principal in any way reduced before the loan is repaid at
70 maturity of the shares. But should the borrower desire to repay his loan before it has been repaid by the maturity of the shares, he can have applied to the account the then value of his shares in part payment of the amount due on the loan for principal, interest and premium, &c. on surrendering such shares to the association and paying the balance in cash.

If his loan has been five years in force, he can have applied the full capital value, but if it has not been five years in force he can have applied only the withdrawal value. All loans are repaid at the office of the association in the city of New York. All applications for loans must be made upon blanks provided for that purpose.

Loans are of two kinds. First. Loans upon shares. Second. Loans upon shares and upon real estate. In loans upon shares the borrower pledges the shares simply and receives 70 per cent. of their then withdrawal value, executing a bond and assignment, and paying the same interest and premium and agreeing to pay his dues in exactly the same form as is provided in the bond and mortgage on real estate loans. In the case of real estate loans the security is a bond and a mortgage on real estate, and an assignment of the shares as collateral. The rules in regard to repayment of loans are the same in both classes of loans. All applications for loans are considered and passed upon by the executive committee of the association at the office of the association in the city of New York.

All papers securing loans are drawn at the office of the association in the city of New York and are there executed by the borrowing member, excepting in cases where he resides at such a distance from the office in the city of New York as to make it more convenient for him to execute the papers at the place of his residence, in which case the papers as drawn are sent by the secretary or general attorney of the association to a local attorney at the place of his residence, with check or checks on the Mercantile Trust Company of the City of New York, for the amount of the loan, and with instructions to pay the same over to the borrower on his
71 being able to give a clear and unencumbered title to the property, and on the proper execution of the papers.

Int. 29. Please explain to the court about the paid up shares and interest bearing paid up shares provided for in article 8 of the articles of association, and particularly as to whether or not they were provided for in the original articles of association, the reason for authorizing and issuing them and the relative position and advantage in the association of the holders of paid up and interest bearing paid up shares as compared with the holders of installment shares.

Ans. 29. Shortly after the association had commenced business, that is, in the year 1888, the applications for loans became, and for some years there after continued to be very numerous, and for a very much larger sum in the aggregate than the receipts of the association could supply, the only income of the association being the dues paid in on the installment shares, and the interest and premium on the loans then made by the association. In many cases applications for loans were on file at the office of the association for nearly a year before the association was in funds to make the loans applied for. At the annual meeting of the shareholders of the association held at the city of New York, in the month of April, 1890, article VIII of the articles of association was amended, providing for the issuing of paid up shares and interest bearing paid up shares. The purpose and effect of the issuing of such shares was to so increase the loan fund that applications for loans could be filled more promptly than theretofore.

At the time it was generally supposed by all members of the association, including the directors and officers, that the installment shares would mature in some what less than nine years, and the

prices fixed for the sale of said paid up shares, and interest bearing paid up shares, that is, $50.00 for the paid up shares and $70.00 for the interest bearing paid up shares, were based upon carefully prepared tables by a competent and experienced actuary, sub-
72 mitted to the shareholders at said meeting, which prices were based upon a maturity of about nine years and four months thus giving an advantage to the installment shares. Fifth-eight of the paid up shares were sold and seventeen hundred and ninety of the interest bearing paid up shares were sold, producing altogether $128,200.00, which was used to make loans. At no time did the aggregate capital value of these two classes of shares amount to more than ten per cent. of the capital value of the installment shares. For a number of years the installment shares continued to be more profitable than either the paid up shares, or the interest bearing paid up shares, thus fulfilling the expectation of the shareholders in this. But when the association had incurred serious losses by being compelled to acquire real estate by foreclosure, or from other causes, the difference between the installment shares and the other classes of shares began to diminish, and immediately the directors and officers took steps to cause the shares to be withdrawn, first by reducing the amount of interest paid on the interest bearing shares, and then by entirely cutting off the interest thereon, which resulted in all of the interest bearing paid up shares being withdrawn, and all of the paid up shares being withdrawn except five, with a result beneficial to the installment shares. There are now no interest bearing shares in the association, and only five paid up shares. At no time did the holders of paid up shares, or interest bearing paid up shares, have any advantage over the holders of installment shares.

Int. 30. State in what States, if any, was the defendant association lending money before it began lending money to its members residing in the State of Mississippi.

Ans. 30. Before the defendant association had loaned any money on the security of mortgage on real estate in the State of Mississippi, it had loaned money to members on the security of real estate in the States of New York, New Jersey, Pennsylvania, Ohio, Georgia, Alabama, Virginia, Tennessee, Florida, Nebraska and Kansas.

Int. 31. State whether or not the provision in the bond, assignment of shares and mortgage requiring all payments to be
73 made to the defendant association at its office in the city of New York was embodied in this instrument as used by the association before it began lending money to its Mississippi members, and whether or not these provisions were in any way changed in view of the Mississippi business.

Ans. 31. In all loans whenever or wherever made by the association. the loans have been secured by bonds, assignments of shares, and mortgages or deeds of trust embodying exactly the same provisions requiring all payments to be made by the defendant association at its office in the city of New York as were embodied in the bonds, assignments of shares and mortgages given by the plaintiff in this case, and these provisions were in no respect changed in view of the business of the association in Mississippi.

Int. 32. State whether or not under the articles, rules and regulations of the association, the plaintiff, Brahan, is entitled to have his payments of dues credited on the principal of the loan.

Ans. 32. Under the articles of association, and rules and regulations of the association, the plaintiff is not entitled to have payments of dues credited on the principal of the *loan*.

Int. 33. State whether or not the other loans granted and made by the defendant association were made upon the same terms as the first and second loans to the plaintiff Brahan.

Ans. 33. All loans made by the association have been upon exactly the same terms and conditions as the loans made to the said Brahan, except that in loans made prior to April 26th 1890, the period of default was six months and on all loans made subsequent to that time, the period of default has been three months, and in loans made since April 1898 the premium has been 20 cts. a month instead of 50 cts. a month on each $100.00 borrowed.

Int. 34. State whether or not the plaintiff Brahan, during the continuance of his loans, and while a member of the association, received any advantage or profit from the payments by himself and other borrowers of the dues, interest, premiums and fines stated.

74 Ans. 34. At all times during the continuance of the membership of said Brahan in said association his shares were constantly increasing in value by the payment of dues thereon, and by the crediting thereon of profits made up of all payments made by himself and other borrowers for interest, and premium and fines, such interest, premium and fines which were paid by the said Brahan, and by all other borrowing members of the association constituted in great part the profits made by the association, and which profits were apportioned quarterly among all the shares in force, including the shares of the plaintiff Brahan while he was a member, and thereby increasing the value of the shares of said Brahan on their way toward maturity, and said profits amounting to $21.20 or more, were so apportioned and credited to the said 25 shares of said Brahan while said first loan was in force, and of these profits so credited the proper amount which Brahan was entitled to receive on withdrawing his share was paid to him by the association when his shares were withdrawn. The said Brahan withdrew five of said shares in October, 1894, after the payment of the first loan, and before the making of the second loan, and while he was no longer a borrower from the association, but simply a member holding shares, and on such withdrawal he received the amount which he was entitled to receive under the articles of association, known as the withdrawal value of the shares, but which was less than their full value. This withdrawal value was made up of five-sixths of the dues paid on the shares, amounting to $70.00, with interest thereon for the average time during which said amount had been in the hands of the association, which amounted to $4.90, less the withdrawal fee of $1.00 and this $4.90 was made up from the profits earned by the association from the payments made by all borrowers including said Brahan for premium and

interest on their loans, and fines paid by them, and which premiums and interest were paid on loans made by the association to its members in the State of Mississippi, and other States,
75 and which were all made upon precisely the same terms as the said loans made to the said Brahan, and which loans in Mississippi were all usurious if the said loans made to the said Brahan were usurious. That is, the plaintiff Brahan when he withdrew his five shares in October 1894, received his proportionate share of profits earned by the association, which profits he alleges to have been usurious, and these alleged usurious profits the said Brahan still retains and has never paid them back or tendered them to the defendant association. When the said Brahan withdrew his 20 shares on repayment of the second loan, he also received the withdrawal value of the said 20 shares made up in the same manner as the withdrawal value of the five shares, and on the repayment of said second loan the withdrawal value of said shares was applied at his request in part payment of the amount then due on the loan, and by such application in part payment of said loan the plaintiff Brahan then received the profits which he was then entitled to receive on withdrawal of his shares, and which profits were also made up of interest and premium paid by said Brahan and by all borrowing members of the association in the State of Mississippi and other States on loans made to them upon precisely the same terms as the said second loan made to said Brahan, and which loans in Mississippi were more than one hundred in number and were all usurious if said second loan to Brahan was usurious, and these profits said Brahan retained by using them as a cash payment on his loan, and has never paid them back or tendered them to said association other than by using them in part payment of his debt to the association as above explained. And in so using the withdrawal value of his shares in part payment of his second loan, said plaintiff received his proportionate share of the profits of the association claimed by him to be usurious.

At the time of repayment of the second loan the twenty shares then held by said Brahan had been for more than three years in force, and under the articles of association then in force, the said
76 Brahan was entitled on withdrawing his shares to one-half the profits credited thereto, as per the last previous apportionment, which was made December 31st 1896, and which half profits amounted to $70.70. The withdrawal value was made up as follows:

5/6 of dues paid on 20 shares for 58 months.....	580.00
½ profits as per apportionment Dec. 31/96.....	70.70
	$650.70
Withdrawal fee.....	1.00
Withdrawal value of said 20 shares which was paid to said Brahan.....	$649.70

Int. 35. If you say that the plaintiff Brahan has received any profits arising from such payments by himself and other borrowers, state whether or not he still holds said profits or has ever paid them back or tendered them to the defendant association.

Int. 36. State the facts in reference to the said Brahan's repayment of his two said loans.

Ans. 36. On repayment of the first loan the association furnished said Brahan with a statement of the amount required to pay the principal sum with interest and premium due thereon and fines, and dues on shares unpaid, and also furnished him with a statement of the then withdrawal value of his shares. Brahan elected to pay in cash the full amount due the association and to retain his twenty-five shares, and from the time of the repayment of the first loan, up to the making of the second loan, the said Brahan was a shareholder of the association sharing in its profits by having his proportionate share credited to his share account on the books of the association. The first loan was repaid, as I have already stated, at the city of New York, mostly from the proceeds of a draft for $2500.00 received in November 1893, by the association at New York, and there collected from the Hanover Fire Insurance Company, as I have already explained.

The second loan was repaid at the office of the association in the city of New York on or about March 10th 1897, by applying the withdrawal value of the twenty shares held by said Brahan
77 in part payment, and by applying the proceeds of a draft drawn by the First National Bank of Meridian on the National Park Bank of New York, amounting to $1473.96, and the amount of which draft was paid by the said bank to said association at the city of New York. This repayment was made strictly in accordance with the articles of association and under the terms of the contract contained in the bond and mortgage and assignment of shares executed by Brahan, and on this repayment of the loan the said Brahan received the proportionate share of the alleged usurious profits to which he was entitled under the articles of association, by having the same, then amounting to $70.70 applied in making up the withdrawal value of his twenty shares which value was then applied in part payment of the loan.

Int. 37. State whether or not his said loans were paid and settled by the plaintiff Brahan voluntarily, or whether he was forced to pay them, or either of them, by defendant association.

Ans. 37. The said two loans were paid and settled by the plaintiff Brahan voluntarily, and that he was not forced to pay them, or either of them, by the defendant association.

Int. 38. State whether or not at any time after the payment of said loans or either of them, and before the bringing of this suit, the plaintiff Brahan made any objection to the settlement of said loan as made.

Ans. 38. The plaintiff Brahan never made any objection to the settlement of the said two loans prior to the bringing of this suit.

Int. 39. State how each of said loans was paid, giving the statements in detail.

Ans. 39. The said two loans were fully repaid according to the following statements. The amount required to pay off the first loan on November 15th 1893 was made up as follows: including arrears of dues on shares,

78	Principal of loan	2500.00
	Redemption fee on 25 shares	12.50
	Interest to Nov. 15, 1893, 2½ months	31.25
	Premium for September and October 1893 and from November 1st to November 15/93	31.25
	Dues for Sept. & October 1893	30.00
	Fines	5.00
	Notary fee on release of mortgage	1.00
	Total	$2611.00

This was paid as follows:

Proceeds of insurance draft received in November 1893	2500.00
Balance then due was	111.00
The November dues which were not included in the $2611.00 were	15.00
Balance then due was	$126.00

The plaintiff Brahan paid this amount as follows:

On or about December 19, 1893	112.50
On or about January 17, 1894	13.50

thus leaving the shares free and unpledged.

The second loan was paid as per the following statement:

Due March 10, 1897, principal	2000.00
Redemption fee	10.00
Interest, Dec. 1/96 to March 1/97	30.00
Premium " " " "	30.00
Dues, December 1897, Jan. & Feb. 1897	36.00
Fines	8.00
Notary fee	1.00
	$2115.00
Add ten days' interest and premium to March 10, 1897, at 66⅔ cts. per day	6.66
Fines for February 1897	2.00
Total amount due March 10 1897	$2123.66
Withdrawal value of shares credited & applied thereon	649.70
Balance paid in cash on or about March 10th, 1897	$1473.96

Int. 40. State whether the withdrawal value of the shares thus held by the said Brahan were not used by him in part payment of said first loan.

79 Ans. 40. The withdrawal value of the shares held by said Brahan was not used in any way in part payment of his said first loan.

Int. 41. State what was done with the 25 shares owned by said Brahan after said first loan was paid by him.

Ans. 41. After the first loan was paid by said Brahan he retained the said twenty-five shares until October 1894 at which time he withdrew five of said shares and received their withdrawal value as I have already explained, and retained the twenty shares remaining and pledged the same on the said second loan made to him and these shares were withdrawn by said Brahan at the time of the repayment of the second loan and their withdrawal value used in part payment of his said second loan, as I have already explained.

Int. 42. If you say that plaintiff Brahan withdrew any part of said shares, state how many of said shares were withdrawn. State the withdrawal value thereof, how obtained and what amount was received by said Brahan.

Ans. 42. All of said shares were withdrawn, five shares in October, 1884, and twenty shares on repayment of the second loan in March 1897. The withdrawal value of the five shares was $73.90, made up as follows:

5/6 of $84.00 dues paid thereon	70.00
Interest thereon for average time this amount was in the hands of the association	4.90
Total	74.90
Less withdrawal fee of	1.00
Total withdrawal value of said 5 shares Oct. 18, 1894	73.90

And the withdrawal value of the 20 shares was $640.70 made up as follows:

5/6 of $696.00 dues paid thereon for 58 months	580.00
½ profits thereon as per apportionment made December 31/96	70.70
	650.70
Less withdrawal fee of	1.00
Withdrawal value of said 20 shares which was applied in part payment of second loan March 10, 1897	$649.70

80 And the said Brahan received the said $73.90 withdrawal value of the five shares when he withdrew the same in October 1894, and received the other, the $649.70 withdrawal value of the said twenty shares when he withdrew the same in March 1897, at which time the said withdrawal value was applied at his request in part payment of said second loan.

Int. 43. If you have not already so stated, state what profits were received by said Brahan in the settlement of said loans, and of what said profits consisted.

Ans. 43. I have already fully explained what profits were received by said Brahan in the settlement of said loan, and of what said profits consisted.

Int. 44. State anything further of benefit or advantage to the defendant.

Ans. 44. When the said five shares and the said twenty shares were withdrawn by the said Brahan he delivered to the association his written receipts therefor, which are hereto attached marked Exhibits "8" and "9," I also attach to my deposition the original mortgage executed by said Brahan on the first loan, marked Exhibit "10," and also attach hereto copy of the mortgage executed by said Brahan on the second loan, marked Exhibit "11."

I further state that the profits which were included in the withdrawal value of the twenty shares paid over to Brahan, as I have already explained, were made up in great part of interest and premium paid by borrowers from the association on more than one thousand loans made in different States, and of which loans more than one hundred were made by the association to its members in the State of Mississippi, and these one hundred loans, and more, in the State of Mississippi, were made upon the same terms as to payment of interest and premium, as were the loans made to said Brahan.

I also state that when the second loan was made to said Brahan he was a citizen and resident of the State of Mississippi, and the defendant association was a resident of the State of New York, and the bond and mortgage executed by said Brahan state that
81 they were made with reference to, and under the laws of the State of New York, and that said laws are to govern in enforcing and expounding the contract therein contained.

WILLIAM GIBSON.

COCHRAN & BOZEMAN, *D. Att'ys.*

In the Circuit Court of Lauderdale County, Miss.

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF New York.

To F. V. Brahan, plaintiff, or Fewell & Son, attorneys for plaintiff:

This is to notify you that we have filed interrogatories in the office of the clerk of the circuit court of this county, copies of which are hereby attached, directed to William Gibson and George J. Peet, witnesses for the defendant in the above styled cause, residing in the city of New York, and State of New York, and that on the 26th day of September, 1899, we will procure a commission to be issued to take the depositions of said witnesses, Within such time you may, — such cross-interrogatories as you may desire.

COCHRAN & BOZEMAN,
Attorneys for Defendant.

To the sheriff of Lauderdale county to execute and return.
COCHRAN & BOZEMAN, *D. A.*

I have this day executed the above notice by delivering to F. V. Brahan, plaintiff, a true copy thereof with a true copy of said interrogatories attached. This Sept. 16th 1899.
J. E. REED, *Sh'ff.*
By R. H. JEMISON, *D. S.*

82 F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF New York.

Cross Interrogatories to be Propounded to William Gibson.

X Int. 1. At the time of the organization of the company what was the amount of its capital stock and what amount of same was paid in?

The witness, William Gibson, in answer to the first cross-interrogatory says: At the time of the organization of the company, there was no limit to the amount of the capital stock. The shares were installment shares, and nothing was paid at that time; nothing was paid on the shares until the first month's dues were paid

X Int. 2. Who organized the company, give the names of the organizers; who elected the board of directors and the officers of the company; give the names of the persons who were present at the organization and election, and state the amount each had subscribed to the capital stock, and what amount each had paid in, and where the money was deposited. Give copies of the minutes of said meeting and said election.

X Ans. 2. The names of the organizers of the association were:
H. C. Alleman,
L. Gladding Gadd,
Joseph J. Little,
Chas. E. Shade,
Charles B. Peet,
Eugene S. Eunson,
James R. Pitcher,
Calvin T. Hazen,
Wm. Bro. Smith,
and these were the persons who were present at the organization and who elected the board of directors. These persons, however, did not elect the officers, because the officers were and are elected
83 by the board of directors. Each one of the persons above named had subscribed for one hundred shares of the association. None of them had paid in anything on said shares at that time because such payments were not required or proper, consequently the money was not deposited anywhere. A copy of the minutes of the meeting of the organizers is as follows: "H. C. Alle-
"man, L. Gadding Gadd, Joseph J. Little, Chas. E. Shade, Charles

"B. Peet, Eugene S. Eunson, James R. Pitcher, Calvin T. Hazen, "Wm. Bro. Smith, subscribers to the foregoing articles of association, "met as incorporators in the directors' room of the United States "Mutual Accident Association, 320 Broadway, New York, on Thurs- "day afternoon, the 19th day of April, 1888, and organized by Colo- "nel Alleman calling Mr. Joseph J. Little to the chair, and the elec- "tion of Mr. Calvin T. Hazen as secretary. Colonel Alleman then "moved the adoption of the foregoing articles of association which "was unanimously agreed to. A series of by-laws were then con- "sidered, and after amendment on motion of Mr. Gadd they were "unanimously adopted. On motion of Mr. Smith an election was "held for directors of the National Mutual Building and Loan As- "sociation of New York, and the result of the ballot was that H. C. "Alleman, L. Gadding Gadd, Joseph J. Little, Charles B. Peet, James "R. Pitcher, Wm. Bro. Smith, and Eugene S. Eunson, had the highest "and requisite number of votes cast, and they were then declared "duly elected. On motion of Mr. Hazen the election was made "unanimous. On motion of Mr. Peet the meeting of incorporators "adjourned *sine die*."

X Int. 3. What, if any other business than the affairs and busi- ness of the company do the president and each other officer of the company respectively attend to?

X Ans. 3. The said president of the association besides attending to his duties as such, is engaged in the insurance business. The first vice-president is a lawyer and practices law. The second vice- president is a lawyer and journalist. The treasurer has *on* other busi- ness than that connected with the association. The secretary
84 and general manager, and the general attorney have no other business than that connected with the association.

X Int. 4. Give the amount of the salary of each of the officers of the company, including the directors; what amount is paid to each director as salary or allowance of each for services as directors at each meeting, and state how often the directors meet.

X Ans. 4. The salary of the president is $900.00 a year. The salary of the treasurer is $600.00 a year. The salary of the secre- tary and general manager is $4000.00 a year. The salary of the general attorney is $5000.00 a year. The vice-presidents receive no salary. Nothing is paid to any director as salary or allowance for his services as director excepting to one director who resides in Pennsylvania, and to another director who is much of the time ab- sent from the city of New York. Each of these directors is paid the sum of $10.00 for each attendance at the meetings of the board of directors. The board of directors meets monthly as provided in the articles of association.

X Int. 5. Was it not the purpose of the institution and organiza- tion of the company to earn more than 6% or 7% per annum on the capital invested? If not why does the association charge the borrower 5% premium, and 6% interest? Explain why and how it is that the charge of 6% premium and 6% interest is not the same in substance and in earning and paying as charging 12% in- terest? Is not the income of the association and the outlay of the

borrower just the same when 6% premium and 6% interest are charged and paid as if 12% were charged and paid as interest? If a borrower borrowed $1,000.00 you required him to take ten shares of stock, that is shares, and you required him to pay sixty cents per share per month or, on the $1000, $6.00 per month and you also required him to pay 6% per annum interest, payable one twelfth per month or $10.00 per month on the $1,000.00, these payments aggregated $16.00 per month, did they not?

X Ans. 5. The purpose of the institution and organization of
85 the association is fully expressed and set out in section 3 of article 1, of the articles of association, and the expectation was that the association would earn on the capital invested more than 6 % or 7 %. Yes, the interest at 6 % per annum, and 50c. a month on each $10.00 borrowed, the amount of premium in the defendant association does exactly equal, taken together, 12 %, and the monthly payments required by the articles of association of dues on 10 shares, and interest and premium on a loan of $1000.00 on a pledge of 10 shares equals $16.00 per month, but this cross-interrogatory contains an error of fact in assuming that the borrower pays "60c. per share per month, or on the $1000.00, $6.00 per month." The 60c. per month is not charged or paid on the $1000.00, but is paid as dues on 10 shares which when first issued are worth nothing at all, but the ultimate or maturity value of which would be $1000.00. The dues on 10 shares would be $6.00 a month, and the premium on a loan of $1000.00 would be $5.00 a month, and the interest on a loan of $1000.00 would be $5.00 a month aggregating a monthly payment on shares, interest and premium of $16.00 for the first eight years, from the date of the loan, after which the payment of premium stops.

X Int. 6. Why did you require the borrower to take the stock? Explain fully the difference between the scheme of your association and a straight loan at 12 % per annum interest.

X Ans. 6. A building and loan association such as the defendant can loan money only to its shareholders, consequently a borrower must own stock because he cannot be a shareholder unless he does own stock, and under the rules of the defendant association as expressed in the articles of association, the borrower must own and pledge one share of stock for each $100.00 borrowed; the maturity value of a share being $100.00. The fund from which money *loaned* is paid is made up by the contributions of his fellow members, and perhaps to some extent by himself if he has made payments of dues before the loan to him is made. As a borrower makes payments on his dues and of interest and premium on his loan, the sums so paid are loaned out to other members on the
86 same terms that the loan is made to him, and 50c. of the dues paid by him are credited directly on his shares, and all profits that are made by the business are credited on his shares in proportion to their value. The association is thus constantly adding to a fund which it holds for him, with which he can, when the shares mature, pay off his loan. This loan can never be called in by the association so long as he continues his payments, that is, the

dues on shares until they mature, the interest on the loan until the shares mature, and the premium for 8 years. If a "straight loan" had been made to him at 12 % per annum, there would be no fund accumulated for his benefit anywhere. He would have to keep on paying the 12 % per annum until the loan had been repaid and when he repaid the loan there would be no credit at all given to him by the mortgagee. As a member of the building and loan association he is a partner in a firm sharing in the profits in exact proportion to his holdings. Moreover, the loan would have been made to him for a fixed time, say one, two, or three years, and at the end of that period he might be called upon to pay back the money borrowed; not so in a building and loan association.

X Int. 7. State the full amounts paid into the association since its organization, as dues, premium and interest, or on any other account, giving the date of organization and state what has gone with these receipts?

X Ans. 7. Since the organization of the association down to the first day of July, 1899, there had been paid into the association a total of $5,266,566.49, made up as follows:

Dues	$2,582,292.66
Premium	369,887.66
Interest	372,227.25
From all other sources	1,942,158.90

This has been disposed of in making loans to members, in paying the withdrawal value of shares withdrawn, and the maturity value of the shares that have been matured and paid out, and in the necessary expenses of conducting the business of the association.

87 X Int. 8. Give the classes of stock fully, and state the different footing each class is on, and the right of each as participants in the management and in dividends.

X Ans. 8. There are now only three classes of shares in the association. The installment shares, non-interest bearing paid up shares, and stop shares. All interest bearing paid up shares, and all paid up shares excepting 5, have long since been withdrawn, and there are outstanding 142 stop shares. All classes of shares participate equally and in the same way in the management of the association and in profits declared and credited to shares.

X Int. 9. Give the names and addresses of the officers and directors of the association since it was organized.

X Ans. 9. The names and addresses of the officers and directors of the association since it has been organized are as follows:

Presidents: Charles B. Peet.
Secretaries: L. Gadding Gadd.
George R. Sutherland.
William Gibson.
First vice-presidents: J. J. Little.
William Gibson.
G. M. Thompson.

Second vice-presidents: Eugene S. Eunson.
J. Edw. Simmons.
George R. Sutherland.
Bird M. Robinson.
Treasurers: Jas. R. Pitcher.
J. Edw. Simmons.
S. K. Raymond.
General attorneys: H. C. Alleman.
George J. Peet.

The foregoing names comprise also the names of all the persons who have ever been directors of the association excepting Wm. Bro. Smith and Harry W. Jacobs. The residence of all of
88 the above names has been and is the city of New York excepting that of L. Gadding Gadd, whom the witness thinks now resides in Newark, New Jersey, and Wm. Bro. Smith who now resides at Hartford, Connecticut, and Harry W. Jacobs, who now and has always resided at Hazleton, Pennsylvania.

X Int. 10. You are asked on your direct examination about the laws of New York touching usury; are *you* a lawyer; if not how do you know the law?

X Ans. 10. I am not a lawyer, but I am informed on the usury question referred to because I have read the law reports on the question and have heard the matter discussed by lawyers in this office many times.

X Int. 11. Why did the association make dues, premium and interest payable in New York?

X Ans. 11. The dues, premium and interest were made payable at the office of the association in New York, because the association is a New York corporation, having its place of business in the city of New York, and it would have been impossible to conduct its business unless all payments were made at the office of the association.

X Int. 12. Are you one of the original organizers of the company and one of its original officials?

X Ans. 12. No.

X Int. 13. What voice had plaintiff Brahan in the management of the company? Did he participate in the organization of the company, or was he ever invited to any stock-holder's meeting?

X Ans. 13. The plaintiff had the same voice in the management of the association as any other shareholder. By section 4 of article 3 of the articles of association, every member of the association not in arrears is entitled to a vote at all meetings of the shareholders, and he has this right irrespective of the number of shares that he owns. The right to vote goes with the membership, and not with the number of shares. A man holding one share has as much to
89 say as a man holding 100 shares. No, he did not participate in the organization of the company. The company was organized long before he ever became a member. Yes, he was notified of every meeting of the shareholders, a notice having been mailed to him with the postage prepaid thereon, addressed to his place of residence every year during the time he was a member of

e association, giving the date and place of the meeting, all done in rict accordance with the provisions of article 3 of the articles of ssociation.

X Int. 14. How often are stockholders' meeting- held, and what ass of stockholders participate in the meetings?

X Ans. 14. The meetings of the stock-holders are annual, and are eld as provided in articles of association at the city of New York on ie third Wednesday of April in each year, and such meetings have ways been held since the organization of the association, and all ock-holders are authorized to participate in the meetings provided eir shares are in good standing.

X Int. 15. What is your salary and what are your duties?

X Ans. 15. My salary is $4000.00 a year. My duties are the gen- al manager of the association, having control of all its books, apers, and correspondence, and my duties occupy my whole time.

X Int. 16. Explain fully what the difference in the income of our company would be if instead of requiring borrowers to sub- cribe for stock and pay premiums of 6 % thereon and 6 % interest n the loan and in charging 12 % per annum interest on the loan nd allowing borrowers to participate in the profits of the associa- ion?

X Ans. 16. In answer to the sixteenth, cross-interrogatory which itness is not sure that he fully understands, he says: That 6 % pre- ium and 6 % interest, of course, exactly equals 12 %, but it is not ue as assumed in the question that the borrower pays premium on is shares. The premium paid is not on his shares, but on each 100. borrowed. The 60c. per share, the monthly dues, paid by a orrower on a loan of $1000.00, are not paid on the $1000.00 they are paid on the 10 shares pledged on the loan. They are paid 0 on the shares for the purpose of maturing them. Dues are paid by all members whether borrowers or not. The income from nterest and premium would be the same under the conditions amed if such conditions could exist. The association, however, ould not exist unless it had members, and without the payments nade by such members it would have no money to lend, and it annot make loans to any persons who are not members, and per- ons can become members only by taking out shares, and agreeing o pay the monthly dues thereon, and no borrower could, under the rticles of association, share in the profits of the association unless e were also a shareholder, so that the assumed conditions of a bor- ower sharing in profits who was not also a shareholder could not xist.

X Int. 17. Why is the borrower required to take stock?

X Ans. 17. The defendant association cannot loan money except o a member. It is organized largely for the purpose of loaning noney to its members. It cannot loan money to outsiders.

X Int. 18. What goes with the dues, the premium and the inter- st, respectively, as they are paid into the association? That is, how re they applied?

X Ans. 18. The dues that are paid in on the shares are disposed f as follows: 5/6 are spread directly on the shares. The other 1/6

goes into the expense fund. The premium and interest paid are credited on the loans on which they are paid, and together with the 5/6 of the dues aforesaid, go into the loan fund of the association, and are loaned out to other borrowers and the profits made by the business of the association are every three months credited on all shares in the association in proportion to their capital value.

X Int. 19. Give the total amount charged to expense account since the company began business, specifying and itemizing so as to show amount of rents, amount of salaries, amount of taxes, amount
91 of office expense and other items, making up the total.

X Ans. 19. The total amount charged to expense account since the organization of the association up to the first day of July, 1899, has been:

	$478.972.34
Of which rents have amounted to	28,531.04
Salaries of officers and employees	309,137.10
Taxes (tax license)	5,553.42
All other operating expenses including commissions on collections	135,750.78

X Int. 20. State who, what officials, manage the association?

X Ans. 20. The officials who manage the affairs of the association are the president, the secretary and general manager, treasurer, and general attorney, and all under control of the board of directors and the executive committee of the association.

X Int. 21. State whether the association is under the control or supervision of any State department or official, and whether the association is required to make annual reports to any such department or official? If yea, file with your answers copies of such reports as have been made to such department or official?

X Ans. 21. The association is under the direct control and supervision of the superintendent of banks in the State of New York, and is required to make annual reports to his department, and that the association has made such annual reports every year since it is incorporated, and that said reports are on file at the office of the superintendent of banks at Albany. The witness states that these reports are very voluminous, and that to procure and file herewith copies thereof, would require a vast amount of time and labor which the witness is not able to devote to the matter in the limited time given to answer the interrogatories and cross-interrogatories propounded in this cause being informed that the case is triable at the October term; he says that in the month of March of each year, while the plaintiff herein was a member of the association, a
92 printed book that was a substantial copy of the said report to the superintendent of banks was sent to the plaintiff in this case, and to every other shareholder by mail.

X Int. 22. You are asked to state whether the defendant is a building and loan association or a loan association; please say what a building and loan association is, as distinguished from a loan association.

X Ans. 22. The defendant is a building and loan association and

which is an institution that loans money to its shareholders and the money which it loans it receives only from its shareholders, and that he supposes a loan association is a corporation that secures its money from any source and loans it to anybody.

X Int. 23. Your association, the defendant, loaned money to its stockholders on real estate without requiring the money to be used in the erection of buildings, did it not, and whether the borrower lived or proposed to live in the premises, did it not? Append to your answer a form of application for loan in use when plaintiff made his two applications.

X Ans. 23. The association has in some cases loaned its money to its shareholders on real estate without requiring the money to be used in the erection of buildings, or without requiring that the borrower should live on the premises. In further answer to the question the witness says that the applications for loans filed by the plaintiff in this case, and which are already exhibits herein were made on the blanks in use by the association when the plaintiff made his applications.

X Int. 24. State if you were present when Geo. J. Peet's deposition was taken, and if you heard him testify, or have you talked to him about what he testified or did you read his deposition before testifying.

X Ans. 24. At the time this deposition was taken, the deposition of George J. Peet had not been taken, and that he has not talked to Mr. Peet about his evidence.

93 X Int. 25. Are your answers based on fact within your own knowledge or on hearsay.

X Ans 25. My answers are based on facts within my own knowledge.

WILLIAM GIBSON.

Subscribed and sworn to before me this 2nd day of October, 1899.
VINCENT ROSEMON,
Notary Public, New York City, N. Y.

Filed September 21/99.
W. D. CAMERON, *Clerk.*

94 DEFENDANT'S DOCUMENT 1 IDENTIFIED.

Application for Membership in the National Mutual Building and Loan Association of New York.

Principal office, Nos. 49 & 51 Chambers street, New York, P. O. box 3779.

The entrance fee must accompany this application, and will in no case be returned. No withdrawals within one year. Agents have no authority to make contracts or conditions; they are allowed to receive and receipt for the entrance fee only. All writing must be in ink.

This application, and its acceptance by the association, constitutes the contract.

When a parent of guardian applies for shares for minors, the application should be signed by the parent or guardian as "trustee," "parent" or "guardian" for the minor, naming the minor and not by the minor himself. For example, "John Smith, trustee for Clara Brown."

.....

—— ——, agent. 25 shares. 62, No. of agent.

.....

I, Frank V. Brahan, being over 21 years of age, hereby apply for
(Name of applicant.)
membership in the National Mutual Building and Loan Association of New York, and subscribes for 25 shares of stock for —— ——.
(If for self, write "myself," and if for minor write the name of minor.)
P. O. address, town or city Meridian county of Lauderdale, State of Mississippi.

No. of street ——

Occupation att'y at law.

And I hereby agree to punctually pay every month the sum of *$15.00* during the continuance of membership in said association; and further agree, if this application is accepted, to abide by all the terms and conditions contained in the articles of association.

95 I hereby constitute and appoint Charles B. Peet and George R. Sutherland, my attorneys and proxies, authorizing them, or either of them, in the absence or disability of the other, to vote for me and in my name at any general or stated meeting of the association at which I am not personally present.

Dated at Meridian this 30th day of April 1892.

Signature of applicant, FRANK V. BRAHAN.
Signature of agent-, WOODS & CARTER.

Witness:
C. F. WOODS.

96 DEFENDANT'S DOCUMENT 2 IDENTIFIED.

Application for a Loan from the National Mutual Building and Loan Association of New York.

I hereby apply to the National Mutual Building and Loan Association of New York for a loan of *2500.00* dollars on *25* shares in said association on the terms and under the rules and regulations of the said association, and in accordance therewith I hereby agree to make, execute and deliver my bond or note secured by mortgage or deed of trust on my real estate hereinafter described and set forth in the statements, questions and answers, following, to wit:

1. My name is (give full name) Frank V. Brahan, age 35 years.
2. Are you married? Yes.

My wife's / My husband's } name is (give full name) Judith W. Brahan { her / his }
age is 26 years.

3. My occupation is lawyer.

4. Post office address is Meridian, Miss.

5. When is the loan wanted? By 1st June, 1892.

6. Give the situation, dimensions and full description of the land State county, city or town, street, avenue, metes bounds, etc.

(The description must be accurate and full for insertion in the mortgage)

Lots Nos. 8, 9, and 10 block 145 Ragsdale survey of the city of Meridian, Miss. Fronting 180 feet on 26th avenue and also corner-ing on said Ave. and 16th St. and having for depth 162 feet.

* * * * * * *

I promise and agree to furnish at my own expense a full and complete abstract of title to the property offered as security, accompanied by the certificate of an attorney to be designated by said association, or such other proof showing my clear and undisputed title to the property as the association may require. I also agree to pay the sum of ten dollars to cover the expenses of the examination and appraisement of the property. I also agree to pay all taxes and assessments on the property during the continu-
97 ance of the loan, and keep the property insured for the benefit of the association, and I also agree to pay for recording the mortgage or deed of trust, and all fees for official searches and certificate.

FRANK V. BRAHAN.

STATE OF MISSISSIPPI, } ss:
County of Lauderdale, }

Frank V. Brahan being duly sworn, says that he is the same person who made and subscribed the foregoing application and that he knows the contents thereof, and that all the statements therein contained are true, and were made for the purpose of obtaining the loan of money therein mentioned.

FRANK V. BRAHAN.

Sworn to before me this *30th* day of *April* 1892.

C. F. WOODS,
Notary Public.

98 DEFENDANT'S DOCUMENT 3 IDENTIFIED.

Application for a Loan from the National Mutual Building and Loan Association of New York.

I hereby apply to the National Mutual Loan Association of New York for a loan of *2000.00* dollars on *20* shares in said association on the terms and under the rules and regulations of said association, and in accordance therewith I hereby agree to make, execute and deliver my bond or note secured by my mortgage or deed of trust

on my real estate hereinafter described and set forth in the statements, questions and answers following, to-wit:

1. My name is (give full name) Frank V. Brahan Age 37 years —. My wife's name is (give full name) Mrs. Judith W. Brahan her age is 30 years.

3. Occupation is att'y at law.

4. Post office address is Meridian, Miss.

5. When is the loan wanted? At once.

6. Give the situation, dimensions and full description of the lands, State county, city or town, street, avenue, metes bounds, etc.

(Copy description in deed to applicant, if it correctly describes the land on which loan is applied for.)

Lots eight (8), nine (9) and ten (10), block one forty five (145), Ragsdale survey of said city of Meridian, Lauderdale county, State of Mississippi. Fronting 180 feet on 28th Ave., and 162 feet on 16th St.

* * * * * * *

I promise and agree to furnish at my own expense a full and complete abstract of title to the property offered as security, accompanied by the certificate of an attorney to be designated by said association, or such other proof showing my clear and undisputed title to the property as the association may require. I also agree to pay the sum of ten dollars to cover the expense of the examination and appraisement of the property. I also agree to pay all taxes and assessments on the property during the continuance of the loan, and keep the property insured for the benefit of the association, with a mortgagee clause approved by the association attached to the policy, and to deliver such policy to the association, and I also agree to pay for recording the mortgage or deed of trust, and all fees for official searches and certificates.

99

FRANK V. BRAHAN.

STATE OF MISSISSIPPI, }
County of Lauderdale, } ss:

Frank V. Brahan being duly sworn says that he is the same person who made and subscribed the foregoing application and that he knows the contents thereof, and that all the statements therein contained are true, and were made for the purpose of obtaining the loan of money therein mentioned.

F. V. BRAHAN.

Sworn to before me this *6th day of* June 1894.

J. L. SPINKS,
J. P. & ex Officio Notary Public.

100 DEFENDANT'S DOCUMENT 3 IDENTIFIED.

Application for a Loan from the National Mutual Building and Loan Association of New York.

I hereby apply to the National Mutual Building and Loan Association of New York for a loan of *2000.00* dollars on *20* shares in said association on the terms and under the rules and regulations of said association, and in accordance therewith I hereby agree to make, execute and deliver my bond or note secured by my mortgage or deed of trust on my real estate hereinafter described and set forth in the statements, questions and answers following, to-wit:

1. My name is (give full name) Frank V. Brahan Age — years.
2. Are you married? Yes. My wife's name is Mrs. Judith W. Brahan her age is — years.
3. Occupation is —
4. Post office address is ——
5. When is the loan wanted? —
6. Give the situation, dimensions and full description of the land, State, county, city or town, street, avenue, metes, bounds, etc.

(Copy description in deed to applicant, if it correctly describes the land on which loan is applied for.)

Lots six (6) and seven (7) of block 145. Ragsdale survey of the city of Meridian, Lauderdale county, Miss.

* * * * * * *

101 I promise and agree to furnish at my own expense a full and complete abstract of title to the property offered as security, accompanied by the certificate of an attorney to be designated by said association, or such other proof showing my clear and undisputed title to the property as the association may require. I also agree to pay the sum of ten dollars to cover the expenses of the examination and appraisement of the property. I also agree to pay all taxes and assessments on the property during the continuance of the loan, and keep the property insured for the benefit of the association, with a mortgagee clause approved by the association attached to the policy, and to deliver such policy to the association, and I also agree to pay for recording the mortgage or deed of trust, and all fees for official searches and certificates.

F. V. BRAHAN.

STATE OF MISS., }
County of Lauderdale, } ss:

F. V. Brahan being duly sworn says that he is the same person who made and subscribed the foregoing application and that he knows the contents thereof, and that all the statements therein contained are true, and were made for the purpose of obtaining the loan of money therein mentioned.

F. V. BRAHAN.

Sworn to before me this 20 day of June 1894.
W. D. CAMERON,
Circuit Court — & ex Officio Notary Public.

102 DEFENDANT'S EXHIBIT 2.

Bond to the National Mutual Building and Loan Association of New York.

Know all men by these presents, that I, *Frank V. Brahan* of the city of *Meridian* in the county of *Lauderdale* and State of *Mississippi*, the owner of 25 shares of the National Mutual Building and Loan Association of New York in certificate number *10199* issue *E 5*, am held and firmly bound unto the National Mutual Building and Loan Association of New York in the sum of five thousand dollars, lawful money of the United States, to be paid to the said association, its successors and assigns, for which payment well and truly to be made, I bind myself, my heirs, executors or administrators, jointly and severally, firmly by these presents.

Sealed with my seal, and dated this 21st day of May in the year of our Lord one thousand — and ninety *two*.

The condition of this obligation is such, that if the above bounden Frank V. Brahan his heirs, executors or administrators, shall well and truly pay or cause to be paid unto the above named National Mutual Building and Loan Association of New York, its successors or assigns, the sum of twenty-five hundred dollars at its office in New York city, with interest for the same at the rate of six per cent. per annum until paid, together with a monthly premium of twelve dollars and fifty cents for eight years or until the earlier maturity of said shares, should they mature before the expiration of the eight years, and in addition thereto the sum of fifteen dollars for the monthly dues on the said 25 shares, which interest, premium and dues are payable monthly on or before the last business day of every month, at the office of the association in New York city, until the maturity of the said shares, except the said monthly premium which is to be paid for eight years only, and also all fines which may be imposed by the said association for default in payment of said interest, premium or dues, and shall truly keep and perform all the conditions herein contained, and required by the articles of association of said obligee, and by such amendments as may be lawfully made to said articles, then this obligation to be void, otherwise to remain in full force and virtue.

103 And it is further hereby expressly agreed, that should any default be made in the payment of the said interest, premium, dues or fines or in the repayment to said association of any insurance premium paid by said association as hereinafter mentioned, or any part thereof, and the same shall remain unpaid and in arrears for three months, or should any tax or assessment levied or imposed upon the premises described in the mortgage accompanying this bond become due and payable, and remain unpaid and in arrears for three months, then and from thenceforth, that is to say after the

lapse of the said three months in either of the preceding events, the aforesaid principal sum and any and all sums for interest, premium, dues or fines shall, at the option of the said association, its successors and assigns, become and be due and payable immediately thereafter, anything hereinbefore contained to the contrary notwithstanding.

And it is hereby expressly agreed, by and between the parties to these presents, that the said obligor shall keep the buildings erected and to be erected upon the lands described in the mortgage accompanying this bond, insured against loss and damage by fire, in an amount, and by insurers approved by the said obligee, its successors and assigns, and pay the premium therefor and deliver to said association the policy and certificate thereof as a collateral security hereto with a mortgagee clause thereto attached in form approved by said association and in default thereof it shall be lawful for the said obligee to effect such insurance, and the premium or premiums paid for securing such insurance shall be added to the principal sum hereby secured to be paid, and shall be payable on demand with interest at the rate of six per cent. per annum. And the party of the first part hereby waives the benefit of his homestead exemption as to this debt. And it is understood and agreed, that the obligor can repay said loan to said association at any time after one year from the date thereof, by giving thirty days' notice in writing to the secretary of the said association, and upon the payment of the principal sum with interest and premium due thereon, and all dues and fines on said shares, and a redemption fee, as provided in the articles of association of said obligee.

104 FRANK V. BRAHAN. [SEAL.]

Signed sealed and delivered in the presence of provisions as to default in payment of insurance premium and mortgagee clauses in two places above were interlined and the words "deliver to said association" were interlined in place of "assign" struck out before execution.

C. F. WOODS.

105 DEFENDANT'S EXHIBIT 3.

Assignment to the National Mutual Building and Loan Association of New York.

Know all men by these presents, that *I, Frank V. Brahan of the city of Meridian*, in the county of *Lauderdale* and State of *Mississippi* in consideration of a loan made to *me* by the National Mutual Building and Loan Association of New York, of *twenty-five hundred* dollars, have agreed to assign and transfer, and do hereby assign and transfer unto the said association, its successors and assigns, all *my* right, title and interest in and to *25* shares of the stock of said association, certificate No. *10190* issue *E 5* now belonging to *me*, and standing in *my* name as a security collateral to *my* bond this day given to the said association for the payment of said loan and interest and pre-

mium thereon, and the monthly dues on said stock at the times and in the manner therein mentioned. And *I* hereby authorize said association, in case *I* should make default in the payment of said loan and interest thereon or any part thereof, or in the payment of monthly dues as required by said bond, or any fines, and shall so remain in default for three months, to cancel said shares of stock above described, and apply the withdrawal value thereof at such time upon my said loan, and in the event any surplus remains after the full payment of said loan and interest thereon, premiums, dues and fines, the same shall be paid to *me, my* executors, administrators, or assigns, and *I* hereby covenant and agree with said association to continue to pay dues upon said shares of stock until said loan shall be wholly paid.

In witness whereof I have hereunto set *my* hand and seal this 21st day of May, in the year one thousand eight hundred and ninety *two*.

FRANK V. BRAHAN. [SEAL.]

Signed, sealed and delivered in the presence of—
A. S. BOZEMAN.

106 DEFENDANT'S EXHIBIT 10.

This indenture, made the *twenty-first* day of *May* in the year of our Lord one thousand eight hundred and ninety *two*, between *Frank V. Brahan of the city of Meridian, county of Lauderdale and State of Mississippi, and Judith W. Brahan, his wife* parties of the first part, and the National Mutual Building and Loan Association of New York, party of the second part.

Whereas, the said *Frank V. Brahan* owner of 25 shares of the said association, in certificate No. *10190* issue *E 5 is* justly indebted and stands firmly bound unto the said National Mutual Building and Loan Association of New York, in the sum of *twenty-five hundred* dollars for money lent or advanced to *him* by said association in accordance with and upon the terms prescribed in the articles of association thereof, to be paid by *his* certain bond or obligation bearing even date with these presents, in the penal sum of *five thousand* dollars conditioned according to the said articles, for the payment of the said sum of *twenty-five hundred* dollars, to the said association, at its office in the city of New York, with interest for the same at six per cent. per annum until paid, together with a monthly premium of *twelve* dollars and *fifty* cents for eight years, or until the earlier maturity of the said shares, should they mature before the expiration of eight years, and the sum of *fifteen* dollars for the monthly dues on the said *25* shares, which interest, premium and dues are payable monthly on or before the last business day of each and every month, at the office of the association in the city of New York, until the maturity of said shares, except the said monthly premium which is to be paid for eight years only, and also for the payment of all fines which may be imposed by the said association for default in the payment of said interest, premium of dues.

Provided however, and it is hereby expressly agreed that if at any time default should be made in the payment of said interest, premium, dues or fines or in the repayment to said association of any insurance premium paid by said association as hereinafter mentioned for the space of three months after the same shall fall due, or should any tax or assessment levied or imposed upon the
107 premises hereinafter described, become due and payable and remain unpaid and in arrears for three months, then the aforesaid principal sum and all interest and premium shall, at the option of said association, become and be due and payable immediately thereafter, and may be enforced and recovered at once, it being mutually understood and agreed, however, that at the maturity of said shares said loan will be cancelled on surrender of said shares to said association.

Now this indenture witnesseth that the said parties of the first part for the better securing the payment of the said loan mentioned in the condition of the said bond, according to the true intent and meaning thereof, and for and in consideration of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and, by these presents, do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part and to its successors and assigns forever. All that certain lot, piece or parcel of land, with the improvements thereon situated lying and being in the city of Meridian, county of Lauderdale and State of Mississippi known and described as lots numbers eight (8) nine (9) and ten (10) in block one hundred and forty-five (145) of Ragsdale's survey of the city of Meridian and being on the northwest corner of Twenty-fifth avenue and Sixteenth street being one hundred and eighty (180) feet on Twenty-fifth avenue by one hundred and sixty two (162) feet on Sixteenth street.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof; and also, all the estate, right, title, interest, dower and right of dower, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part, of, in, and to the same, and of, in, and to every part and parcel thereof, with the appurtenances; *to have and to hold* the above granted, bargained and described premises, with all and singular the rights, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, unto the said party of the second part, its successors and assigns, to the only proper use, benefit, and behoof of the said part- of the second part, its successors and assigns forever.

108 *Provided always*, and these presents are upon this express condition, that if the said parties of the first part, their heirs, executors or administrators shall keep and perform all the conditions of said bond or obligation according to the true intent and

meaning thereof, then these presents and the estate hereby granted shall cease, determine and become void.

And the said *Frank V. Brahan* for *himself*, his heirs, executors and administrators, does covenant and agree to do and perform all the conditions of said bond and obligation according to the true intent and meaning thereof. And if default shall be made in any of the conditions of the said bond or obligation, then the whole principal debt shall immediately become due and recoverable; and from henceforth it shall be lawful for the said party of the second part, its successors or assigns to enter into and upon all, and singular, the premises hereby granted or intended so to be, and sell and dispose of the same and all benefits and equity of redemption of the said parties of the first part their heirs. executors, administrators or assigns therein, at public auction, according to the law in such case made and provided; and as the attorney of the said parties of the first part, for that purpose by these presents duly authorized, constituted and appointed, to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds of conveyance in the law for the same in fee simple, and out of the money arising from such sale retain all the sums of money then due on said bond or obligation, together with all the costs, charges and expenses incident to such sale, including reasonable dollars for attorney's fees therein, and to render the overplus of the purchase money (if any such there be) unto the said *Frank V. Brahan party* of the first part his heirs, executors, administrators or assigns, which sale, so to be made, shall forever be a perpetual bar, both in law and equity, against said parties of the first part their heirs and assigns, and against all other persons claiming, or to claim, the premises, or any part thereof by, from, or under them or either of them.

And the said *Frank V. Brahan* does further covenant for *himself* his heirs and assigns that he will, during all the time until this mortgage is fully paid and satisfied, keep the buildings
109 erected and to be erected upon the lands and premises above conveyed insured against loss or damage by fire, in some insurance company satisfactory to the party of the second part in at lease the sum *of twenty-five hundred* dollars with a mortgagee clause approved by said association attached to policy and deliver said policy and all renewals to said association as collateral security for said bond or obligation. And in default thereof it shall be lawful for the party of the second part, its successors or assigns, to make such insurance for the purposes aforesaid and procure said mortgagee clause to be attached to the policy and to all renewals thereof and pay the premium or premiums therefor which premium or premiums thus paid and the interest thereon from the time of payment, the said *Frank V. Brahan* covenants as aforesaid to pay to the said party of the second part, its successors or assigns, on demand, and that the same shall be deemed to be secured by these presents, and shall be collectible thereupon and thereby as the said moneys mentioned in the said bond and obligation.

And the said parties of the first part do further covenant and agree with the said party of the second part, its successors and

assigns, that they will execute such further assurances of said property as may be requisite to convey the premises above described to the party of the second part. And the parties of the first part hereby expressly waive and relinquish to the party of the second part, all benefit which they have or to which they may be entitled in and to said premises by virtue of any law made or to be made in relation to the exemption of homesteads.

And the said Frank V. Brahan hereby covenants that he is lawfully seized of said premises in fee simple, and that he has good right to convey the same, and that said premises are free and clear of all liens and incumbrances whatsoever, and the said premises in the peaceable and quiet possession of the said party of the second part, its successors, and assigns against all and every person lawfully claiming, or to claim, the whole or any part thereof, will forever warrant and defend.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

FRANK V. BRAHAN.
JUDITH W. BRAHAN.

110 Signed, sealed and delivered in the presence of provisions as to default in payment of insurance premium and cancelling loan, on first page also as to mortgagee clause in two places on this page were interlined and seven words struck out before execution.

C. F. WOODS.

STATE OF MISSISSIPPI, }
Lauderdale County. }

Personally appeared before me C. F. Woods, notary public in and for said county and State the within named Frank V. Brahan and Mrs. Judith W. Brahan his wife, who acknowledged that they signed and delivered the within and foregoing instrument as their act and deed.

Witness my hand and official seal this the 4th day of June, 1892.

C. F. WOODS,
Notary Public.

Filed June 6th, 1892 at 12.30 o'clock p. m.

B. V. WHITE, *Clerk*,
By J. E. NUNNERY, *D. C.*

111 "See page 31 *ante* for Exhibit 4."
"See page 34 *ante* for Exhibit 5."

112 DEFENDANT'S EXHIBIT 6.

MERIDIAN, MISS., —— 7, 1893.

Geo. R. Sutherland, 49 & 51 Chambers St., New York.

DEAR SIR: Yours of the 3d, received. I have concluded to pay up the total am't due as per your statement of the 2d inst. viz. $2611.00 on the loan, and continue my stock. For this purpose, I have to-day instructed the Fire Insurance Company people to send you the check for $2500.00 and during the month I will remit you the balance of $111.00. Woods told me if I would pay him the $30 on a/c of back dues he would receipt my book, otherwise I would have to get you to receipt it. I think I will have to borrow on my shares again in the spring when I rebuild and as I understand it, I can do so whenever I make application. In future shall I pay dues to Woods, or if you prefer and will allow me commissions, same as p'd him I will remit you check or exchange on or before last business day in each month.

Yours truly, F. V. BRAHAN.

When I settle the balance of $111.00 I will want you to have the mortgage of record here cancelled.

B.

113

DEFENDANT'S EXHIBIT 7.

Schedule of all payments for dues and fines on 25 shares in certificate # 10190, issue B 5, issued by the National Mutual Building and Loan Association of New York to Frank V. Brahan, and of all payments of interest and premium made by him on loans # 1180 for $2500.00, and # 2759 for $2000, made to him by said association, and showing the dates at which payments were received at the office of the association in the city of New York, and how the sums were applied.

Date of payment.	Am't appl'd to dues.	Am't appl'd to fines.	Am't appl'd to int.	Am't appl'd — premium.	Total am't of payment.	To what month applied.
1892.						
June 10...	.....	.....	.....	$66.25	$66.25	May, June, July, Aug. Sept. & Oct. 1892.
June 14...	$15.00	.....	$3.75	.....	18.75	May 1892.
July 12...	15.00	.....	12.50	.....	27.50	June 1892.
Aug. 15...	15.00	.....	12.50	.....	27.50	July 1892
Sept. 15..	15.00	.....	12.50	.....	27.50	Aug. 1892.
Oct. 15...	15.00	.....	12.50	.....	27.50	Sept. "
Nov. 11...	15.00	.....	12.50	.....	27.50	Oct. "
Dec. 16...	15.00	.....	12.50	12.50	40.00	Nov. "
1893.						
Jan'y 17..	15.00	.....	12.50	12.50	40.00	Dec. "
Feb'y 16..	15.00	.....	12.50	12.50	40.00	Jan'y 1893
Mar. 20..	15.00	.....	12.50	12.50	40.00	Feb. "
Ap'l 15...	15.00	.....	12.50	12.50	40.00	March "
May 20...	15.00	.....	12.50	12.50	40.00	April "
June 19...	15.00	.....	12.50	12.50	40.00	May "
July 18...	15.00	.....	12.50	12.50	40.00	June "
Aug. 21...	15.00	.....	12.50	12.50	40.00	July "
Sept. 18...	15.00	.....	12.50	12.50	40.00	Aug. "
Dec. 19...	45.00	5.00	31.25	31.25	112.50	Sept. Oct. & Nov. 1893 dues, Sept. & Oct. fines, Sept. & Oct. and to Nov. 15 1893 int. & prem.
1894.						
Jan'y 17..	15.00	.....	.....	.....	15.00	Dec. 1893.
Feb'y 20.	15.00	.....	.....	.....	15.00	Jan'y 1894.
Mar. 19...	15.00	.....	.....	.....	15.00	Feb'y "
April 20..	15.00	.....	.....	.....	15.00	March "
May 22...	15.00	.....	.....	.....	15.00	April "
June 19...	15.00	.....	.....	.....	15.00	May "
July 28...	15.00	.....	.....	.....	15.00	June "
Aug. 28...	15.00	.....	.....	.....	15.00	July "
Sept. 17..	15 00	.....	.....	.....	15.00	Aug "

Five shares of the twenty-five were withdrawn October 3, 1894, and $73.90 was paid to Mr. Brahan.

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Date of payment.	Am't appl'd to dues.	Am't appl'd to fines.	Am't appl'd to int.	Am't appl'd to premium.	Total am't of payment.	To what month ap'l'd.
Oct. 19...	12.00	.....	10.00	10.00	32.00	Sept. 1894
Nov. 19...	12.00	.....	10.00	10.00	32.00	Oct. "
Dec. 18...	12.00	.....	10.00	10.00	32.00	Nov. "
1895.						
Jan'y 24..	12.00	.....	10.00	10.00	32.00	Dec. "
Mar. 25...	24.00	2.00	20.00	20.00	66.00	Jan'y & Feb. 1895.
April 19..	12.00	.....	10.00	10.00	32.00	Mar. 1895
May 20...	12.00	.....	10.00	10.00	32.00	April "
June 18...	12.00	.....	10.00	10.00	32.00	May "
	$528.00	$7.00	$312.50	$312.50	$1160.00	
Carried forward ..	$528.00	$7.00	$312.50	$312.50	$1160.00	
1895.						
July 29...	12.00	.....	10.00	10.00	32.00	June 1895
Aug. 24...	12.00	.....	10.00	10.00	32.00	July "
Sept. 24 ..	12.00	.....	10.00	10.00	32.00	Aug. "
Oct. 19 ...	12.00	.....	10.00	10.00	32.00	Sept. "
Nov. 21...	12.00	.....	10.00	10.00	32.00	Oct. "
1896.						
Jan. 25 ...	24.00	2.00	20.00	20.00	66.00	Nov. & Dec. 1895 fines for Aug. /95
Feb. 24...	12.00	.....	10.00	10.00	32.00	Jan'y 1896
Mar. 31...	12.00	.....	10.00	10.00	32.00	Feb'y "
April 25..	12.00	.....	10.00	10.00	32.00	March "
May 26...	12.00	.....	10.00	10.00	32.00	April "
June 25...	12 00	.....	10 00	10.00	32.00	May "
July 28...	12.00	.....	10 00	10.00	32.00	June "
Aug. 25...	12.00	.....	10.00	10.00	32.00	July "
Sept. 25 ..	12.00	.....	10.00	10.00	32 00	Aug. "
Oct. 26. ..	12.00	.....	10.00	10.00	32.00	Sept. "
Nov. 27...	12.00	.....	10.00	10.00	32.00	Oct. "
Dec. 28...	12.00	.....	10.00	10.00	32.00	Nov. "
1897.						
Mar. 11...	36.00	10.00	33.33	33.33	112.66	Dec. 1896, Jan. Feb'y 1897, dues fines, int. & prem. and March 1897 int. & prem. and Nov. 1895 & Feb. 1896 fines.
	$780.00	$19.00	$525.83	$525 83	$1850.66	

Recapitulation.

Total am't paid in for dues on cert.	# 10190.	$780.00
" " " " "	fines " " # 10190.	19.00
" " " " "	interest on loans # 1186 & 2759.	525.83
" " " " "	premiums " " " " "	525.83
Total am't paid in for dues, fines, interest & premium		$1850.66

115 EXHIBIT 8.

Withdrawal Receipt on Payment of Loan.

Five shares on certificate No. *10190* in the National Mutual Building and Loan Association of New York, are hereby withdrawn, and I have received the sum of *73 90 / 100* dollars, in full for the amount due me from the said association, by reason of such withdrawal.

(Signed) FRANK V. BRAHAN. [SEAL.]

Witness:
C. F. WOODS.

Dated at Meridian this 8 day of Oct. 1894.

116 DEFENDANT'S EXHIBIT 9.

Withdrawal Receipt on Payment of Loan.

20 shares in certificate No. *10190* in the National Mutual Building and Loan Association of New York, are hereby withdrawn, and I have received the sum of 649.70 dollars, in full for the amount due me from the said association, by reason of such withdrawal, such amount being applied at my request in part payment of amount due on loan No. 2759, made by said association to *me*.

(Signed) FRANK V. BRAHAN. [SEAL.]

Witness:
W. E. BASKIN.

Dated at —— this — day of —— 18—.

"See page 35 *ante* for Exhibit 11."

117 DEFENDANT'S EXHIBIT 12.

Copy of a letter from the attorney general of the State of New York to the banking department of that State, printed in the annual report of the superintendent of the banking department to the legislature, dated January 13th, 1890, at page 46.

Legality of fixed premiums by building and loan associations under act 1851.

STATE OF NEW YORK, ATTORNEY GENERAL'S OFFICE,
ALBANY, *November* 13, 1889.

Hon. Charles R. Hall, deputy superintendent, banking department.

DEAR SIR: I am in receipt of your communication asking my opinion upon the following questions:

First. "As to the legality of fixing premiums, either minimum or maximum, by associations organized under the act of 1851" (chapter 122).

Second. "If the practice of fixing a premium, as provided in article 6 of the by-laws of the —— Association of ——, is illegal?"

Third. "If such practice is illegal, what is it 'your duty' to do in the premises in relation to it and similar associations?"

I beg leave to submit the following as my opinion thereon:

The by-laws of the —— Association, fixing the premium, provide as follows:

Article 6. All advances made by this association must be secured by the bond of the applicant and a mortgage on unincumbered real estate, together with the fire insurance policy, if upon improved property; on all advances made by this association to a shareholder, said shareholder shall pay an interest of five per cent. per annum and a premium of five per cent. per annum, and said interest and premium shall be due and payable on Saturday of each week during the continuance of said mortgage. * * *

118 Section 7 of the act of 1851, as amended by chapter 564 of the Laws of 1875 expressly authorize- loans to members, and declares that requiring monthly payments or any premium for loans made to members shall not be deemed a violation of the provisions of any statute against usury.

That only question, therefore, is as to the right to fix in advance the amount of premium by the by-laws.

It is said to be the general practice and the most beneficial manner of fixing premiums to allow the rate to be fixed and regulated in accordance with the competition of members seeking loans, allowing each member to offer such premium as he deems best, and making the loan to the one offering the highest. And indeed it is expressly declared, in chapter 556 of the Laws of 1887, for the incorporation of building companies, that this rule must be followed.

The act of 1851, however, is silent upon this point; it simply declares that the exaction of a premium from a borrowing member, in addition to the usual interest, shall not be usury.

I am referred to Endlich and Paine upon building companies as authorities for denying the right of companies formed under the act of 1851, to fix a definite premium.

These books cite authorities holding that building and loan associations generally have no such power, and in the main such authorities are no doubt correct.

The case of Stiles' appeal (9 W. N. C.) is one of these cases which held definitely that the company could not fix either a maximum or minimum premium, but the amount must be determined by the members bidding for the loan, and the loan made to the highest bidder. But this case arose in Pennsylvania, under the statute of that State for the incorporation of such companies, which statute contains an express provision that loans shall be "offered in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan of not more than the amount fixed by charter as the full value of a share for each share of stock held by such stockholder." Brightley's Purdon's Digest, col. I, p. 223.

119 So in the case of The State of Ohio vs. Greenville Building Association (29 Ohio State, 92), where it was held that the premium could not be fixed at an arbitrary sum, the statute under which the corporation was formed provided that "such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money by rates of stated dues, fines, interest on loans advanced and premium bid by members or depositors for the right of precedence in taking loans, as the corporation by its by-laws shall adopt." The court held that this statute contemplated that all the members must have the right to "bid for the right of precedence," and that the premium should be fixed by such bidding.

The case of The State of Ohio vs. The Oberlin Building and Loan Association (35 O. S., 258), enunciated the same principal under the same section of the same statute. In all these cases there was a provision in the statute which directed that loans to members should be bid for and which contemplated, of course, that the rate of premium should be regulated by such bids.

There is no such provision in the act of 1851. That act simply authorizes the changing of a premium; is silent as to how the amount of such premium shall be fixed, and authorizes the society to make rules not inconsistent with the constitution or laws of the State.

The members make by-laws and are not confined in this right to the making of by-laws which are the most beneficial. The members themselves are the sole judges of which is or what is not beneficial in the making of by-laws. They are only restrained in so far that they cannot legally make a by-law which contravenes the constitution or general law of the State.

I find nothing in the by-laws in question of the corporation under consideration which violates the law or constitution of this State; and am of the opinion, therefore, that corporations formed under chapter 122 of the Laws of 1851, may fix by by-law maximum or minimum premiums; and that article six of the copy of the by-laws of the association, a copy of which you have furnished me, is not illegal.

Having come to this conclusion, it is, of course, unnecessary to consider the other question.

Very respectfully, your obedient servant,

CHAS. F. TABOR,
Attorney General.

120 In the Circuit Court of Lauderdale County, Mississippi.

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK.

Interrogatories to be Propounded to George J. Peet, a Witness for Defendant, Residing in the City and State of New York.

Int. 1. State your name, age, and place of residence.

GEORGE J. PEET, one of the witnesses, being duly sworn, says:

In answer to the first interrogatory, my name is George J. Peet, I am 54 years of age and reside in the city of New York.

Int. 2. State what connection you now have with the defendant association, how long you have been so connected with the defendant, and whether or not during such period you have been familiar with the management and transaction of its affairs.

Ans. 2. I am now, and have been since early in the year 1889, a director of the defendant association, and its general attorney, and during all that time I have been familiar with the management of the association and the transaction of its affairs?

Int. 3. State under what act or law the defendant association was incorporated, and when and how.

Ans. 3. The defendant association was incorporated under, and in pursuance of the provisions of chapter 122 of the New York Laws of 1851, and the acts amendatory thereof, and was so incorporated in the month of April, 1888, by the making and filing of articles of association in the office of the clerk of the city and county of New York, and by complying with the provisions of section 2 and 3 of said acts.

Int. 4. State whether or not all loans made to members of the association have been made upon the same terms as the loans in question to the plaintiff Brahan.

Ans. 4. All loans that the association has made have been made to members of the association, and have been upon precisely
121 the same terms as the loans in question made to the plaintiff Brahan, excepting that for a short time after the incorporation of the association, the bonds and mortgages provided for six months default which subsequently was changed to three months, and on loans made since the month of April, 1898, since which time the association has had difficulty in loaning all its moneys, the rate of premium has been reduced from 50 cts. per month. to 20 cts. per month on each $100.00 borrowed.

Int. 5. State whether or not the provisions in the bonds, assignments of shares and mortgages executed by the plaintiff Brahan requiring all payments to be made to the association at its office in the city of New York have been in all other bonds, assignments of

shares and mortgages executed by borrowing members to the defendant association.

Ans. 5. In all loans made by the association, the provisions in the bonds the mortgages and assignments of shares have required all payments to be made to the association at its office in the city of New York.

Int. 6. State the reasons of the association in making this provisions in its contract, and, in this connection, state whether or not it was inserted in the instrument executed by Brahan for the purpose or with the intent in any respect to violate or evade the usury laws of the State of Mississippi.

Ans. 6. The reason that provision was made in the papers taken to secure loans requiring all payments to be made in the city of New York was because the association was a New York association incorporated under the laws of New York, and having its office in the city of New York. This provision applied not only to borrowers, but to all members, those who did not borrow, as well as those who did. The association was organized primarily to loan money to its members in the State of New York on the security of real property in that State, and it was necessary for the orderly and proper conduct of its business that payments should be made
122 at the home office, and when the association began to make loans to its members, on the security of real property in other States, and on the security of shares owned by members residing in other States, it continued to make the same provision in the papers that it took to secure such loans, and with no thought thereby to evade the usury laws of Mississippi or of any other State. The association made loans in many States before it had any members, or made any loan, in the State of Mississippi.

Int. 7. State whether or not the contract requiring the payment by the plaintiff Brahan of six per cent. interest and fifty cents monthly premium on each $100.00 by him was usurious under the laws of the State of New York, where it is performable.

Ans. 7. The contract, as expressed in the bond, the mortgage and the assignment of shares given by the plaintiff Brahan to secure the loans made to him, was not usurious under the laws of the State of New York, but would, by the courts of that State be enforced in strict accordance with its terms.

Int. 8. State what is a fixed premium, and whether or not the taking of a fixed premium is authorized by the laws of the State of New York.

Ans. 8. That premiums in a building and loan association may be divided into two general classes. First, auction premium. Second, fixed premium. An auction premium is a premium that is ascertained by competition between members desiring to borrow the funds of the association, the member bidding the highest rate of premium getting the money. A fixed premium is one that is designated in the articles of association, or the by-laws, and is always the same. These two general divisions are again subdivided into different sorts, principally as to how the premium is to be paid, that is, whether it is paid in a lump sum or whether it is paid in install-

ments. The fixed premium in the defendant association is paid in installments. A member receives the whole of the amount borrowed. The fixed premium is used by many associations incorporated under the act under which the defendant association is
123 incorporated and doing business, and is fully authorized by the laws of the State of New York, under which the association is incorporated.

Section 7 of the act aforesaid, chapter 122 of the New York Laws of 1851 as amended June 9th 1875, provides:

"Nor shall the imposition of fines for the non-payment of dues or fees, or other violation of the articles of association, nor shall the making of any monthly payment required by the articles of association, or of any premium, on loans, made to members be deemed a violation of any statute against usury."

The attorney general of the State of New York, on the 13th of November, 1889, gave an opinion to the superintendent of banks of the State of New York, which is printed in the annual report of the superintendent of the banking department of the State of New York for the year 1889 at page 46, in which he says that—"corporations formed under chapter 122 of the Laws of 1851 may fix by maximum or minimum premiums," and that a type-written copy of that opinion is filed herewith and marked Exhibit "12." There is no decision in any court in the State of New York holding a fixed premium by building and loan associations to be illegal, but the court of appeals of Virginia, in the case of Ashworth *vs.* this association, reported in 22nd S. E. Rep., at page 521, in considering a loan that was precisely in its terms like the loans made to the plaintiff in this case, decided that a fixed premium was lawful and proper under the laws of New York.

Int. 9. State what attention you have given to the matter of building and loan associations, and the laws regulating the same, and state the difference, if any, in practical advantage to the borrower between the payment of a fixed premium by installments, and the payment of a premium in one sum fixed by open bidding.

Ans. 9. That he has given a great deal of attention to the matter of building and loan associations and the laws concerning the same. That since he has been the general attorney of the defendant association he has had the entire charge of its legal affairs, and has acted as attorney or counsel in a great deal of litigation in which the defendant association has been a party, and in which
124 almost all questions that can be raised in regard to the contract that a member of the building and loan association makes, as such, have been investigated and discussed.

The auction premium is uneven and unequal and often works injustice to the members as between themselves. Under the excitement of competition at such auction sales of funds of a building and loan association a member often bids an absurdly high premium, and immediately thereafter at the same meeting may secure his loan at a premium much less than that bid by his brother member. The system of auction premium is a harsh and inequitable one, and in the language of the court in the case of Archer *v.* Baltimore

Building and Loan Association, 30th S. E. Rep., 241,—"It is unjust, unequal, deceptive, and oftentimes a harsh way of disposing of the funds, to the detriment of those who are most needy."

A fixed premium, on the other hand, is uniform and unchang-able and each borrower pays exactly the same for the money loaned him that is paid by other borrowers.

Int. 10. State whether or not the taking of a fixed premium is in any way a departure from the building and loan association plan.

Ans. 10. The taking of a fixed premium is not a departure from the building and loan association plan. The building and loan statutes of some of the States prescribe the sort of premium that may be taken by building and loan associations. The statute under which the defendant association is incorporated, does not limit the premium to any particular sort, and yet the fixed premium is in New York held to be legal. The same is true in the State of New Jersey; see New Jersey Building & Loan & Investment Company *v.* Bachelor, 35th Atlantic Rep. at page 748, and the same is the law in Minnesota, where the court in the case of The Zenith Building & Loan Association *v.* Heinbach, decided, on June 22, 1899? said:

"We have no statute which requires building and loan associations of the class to which the plaintiff belongs, to loan its funds at compet-ive bidding only, or forbidding them from adopting
125 a by-law fixing a minimum premium. Such a by-law applies to all borrowers alike, and does not trench on the mutuality feature of such associations."

Int. 11. State whether or not the issuance of paid up shares and paid up interest bearing shares is in any way an innovation upon or departure from the ordinary building & loan association plan.

Ans. 11. Paid up shares, and interest bearing paid up shares have long been incorporated in the plans of building and loan associations both in England and in many of the States of the United States. In England by chapter 42 of 37th and 38th Victoria, section 5, in the year 1874, such associations were specially authorized by law to have prepaid stock, but before there was any statutory provision on the subject in England, it was held that under the law, as it existed prior to 1874, which was substantially like the law under which the defendant association is incorporated, that prepaid stock was not illegal. (See Scot's case (L. R. 23 Ch. Viv.) 453.) The court of appeals of the State of New York in the case of The People *ex rel.* Fairchild *v.* Preston, 140 N. Y. 554, discussed the whole subject of prepaid shares, and interest bearing prepaid shares in building and loan associations incorporated under the law of the State of New York, and rendered a unanimous decision upholding their legality. Judge Endlich in his work on building and loan associations at 464, reaches the same conclusion.

Int. 12. Explain why payments of dues on shares paid by borrowing members cannot be properly credited as payments on the principal sum loaned.

Ans. 12. All members of the association pay the same dues on their shares and such payments are credited exactly in the same way on all shares, whether pledged on loans or not. The plan of

the association being that when the shares are worth $100.00 the member is to receive the $100.00. Not all members are borrowers; in the defendant association the number of shares borrowed on is about equal to the amount of shares not borrowed upon. There is no contract made with the borrower to credit his payments of
126 dues on account of his loan. If the association should make a credit on account of the loan on payment of dues, it would be giving the borrower double credit for such payments, first, as a shareholder, the same as his brother who did not borrow, and second to him as a borrower. The shares are pledged simply as collateral security. Many members in the association repay their loans and retain their shares as an investment, which in fact, was done by the plaintiff in this case; he paid off his first loan in cash without using his share values, and continued to pay the dues on his shares thereafter, just as though he had never borrowed on them.

Int. 13. State whether or not there was any truth in the charge made by the plaintiff in his declaration that the defendant was not a building & loan association in fact, but a mere money lender.

Ans. 13. The association since its organization, has been carrying on the business of a building and loan association, and it is a corporation of that class pure and simple, and has never loaned money to anybody excepting to one of its shareholders, and there is no truth in the plaintiff's declaration to the contrary. The association has matured its earliest issue of shares, and the holders thereof have received $100.00 per share.

Int. 14. State anything else that may be of benefit or advantage to the defendant in this suit.

Ans. 14. To the fourteenth interrogatory he makes no answer.

GEO. J. PEET.

Subscribed and sworn to before me this 2nd day of October, 1899.

VINCENT ROSEMAN,
Notary Public, New York City, N. Y.

Fees, $25 paid by def't.

V. R., *N. P.*

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vs.
THE NATIONAL MUTUAL B. & L. ASS'N.

Crossed Interrogatories to be Propounded to Geo. J. Peet.

X Int. 1. At the time of the organization of the company what was the amount of its capital stock and what amount of same was paid it?

X Ans. 1. The witness, George J. Peet, in answer to the first cross-interrogatory says: That he has read the interrogatories propounded to William Gibson, the witness in this cause, and the cross-interrogatories, and all of said Gibson's answer to said interrogatories and cross-interrogatories. That the answer of said Gibson to the first cross-interrogatory is true, and the witness adopts it as his answer to his first cross-interrogatory.

X Int. 2. Who organized the company. Give the names of the organizers; who elected the board of directors and the officers of the company; give the names of the persons who were present at the organization and election, and state the amount each had subscribed to the capital stock, and what amount each had paid in, and where the money was deposited. Give copies of the minutes of said meeting and said election.

In answer to the second cross-interrogatory he says: That the answer of said Gibson to his second cross-interrogatory is true and the witness adopts it as his answer to his second cross-interrogatory.

X Int. 3. What, if any other, business than the affairs and business of the company do the president and each other officer of the company respectively, attend to?

In answer to the third cross-interrogatory he says: That the answer of said Gibson to the third cross-interrogatory is true and the witness adopts it as his answer to his third cross-interrogatory.

X Int. 4. Give the amount of the salary of each of the officers of the company, including the directors; what amount is paid
128 to each director as salary or allowance of each for services as directors at each meeting, and state how often the directors meet.

In answer to the fourth cross-interrogatory he says: That the answer of said Gibson to his fourth cross-interrogatory is true and the witness adopts it as his answer to his fourth cross-interrogatory.

X Int. 5. Was it not the purpose of the institution and organization of the company to earn more than 6 % or 7 % per annum on the capital invested? If not why does the association charge the borrower 6 % premium and 6 % interest? Explain why & how it is that the charge of 6 % premium and 6 % interest is not the same in substance and in earning and paying as charging 12 % interest? Is not the income of the association and the out-lay of the borrower just the same when 6 % premium and 6 % interest are charged and paid as if 12 % were charged and paid as interest? If a borrower borrowed $1,000.00 you required him to take ten shares of stock, that is, shares and you required him to pay sixty cents per share per month, or on the $1000., $6.00 per month and you also required him to pay 6 % per annum interest, payable one twelfth per month or $10.00 per month on the $1,000.00; these payments aggregated $16.00 per month, did they not?

In answer to the fifth cross-interrogatory he says: That the answer of said Gibsonto the fifth cross-interrogatory is true, and the witness adopts it as his answer to his fifth cross-interrogatory.

X Int. 6. Why did you require the borrower to take the stock? Explain fully the difference between the scheme of your association and a straight loan at 12 % per annum interest.

In answer to the sixth cross-interrogatory he says: That the answer of said Gibson to his sixth cross-interrogatory is true and the witness adopts it as his answer to his sixth cross-interrogatory.

X Int. 7. State the full amount paid into the association since its organization, as dues, premium and interest, or on any other ac-

count, giving the date of organization and state what has
129 gone with these receipts?

In answer to the seventh cross-interrogatory he says: That the answer of said Gibson to his seventh cross-interrogatory is true and the witness adopts it as his answer to his seventh cross-interrogatory.

X Int. 8. Give the classes of stock fully, and state the different footing each class is on, and the rights of each as participants in the management and in dividends.

In answer to the eight cross-interrogatory he says: That the answer of said Gibson to his eight cross-interrogatory is true and witness adopts it as his answer to his eight cross-interrogatory.

X Int. 9. Give the names and addresses of the officers and directors of the association since it was organized.

In answer to the ninth cross-interrogatory he says: That the answer of said Gibson to his ninth cross-interrogatory is true and the witness adopts it as his answer to his ninth cross-interrogatory, and in addition the witness states that the officers and directors of the association at the present time, are as follows:

President, Charles B. Peet.
Secretary & general manager, William Gibson.
Treasurer, Samuel K. Raymond.
First vice-president, Gouverneur M. Thompson.
Second vice-president, Bird M. Robinson.
General attorney, George J. Peet.

And that the foregoing, together with Harry W. Jacobs, constitute the directors of the association.

X Int. 10. You are asked on your direct examination about the laws of New York touching usury; are you a lawyer; if not how do you know the law?

In answer to the tenth interrogatory he says: I am a lawyer, a member of the bar of New York, and have been such since the year 1868, and am informed upon the laws of New York and other States in reference to usury.

130 X Int. 11. Why did the association make dues, premium and interest payable in New York?

In answe- to the eleventh cross-interrogatory he says: That the answe- of said Gibson to his eleventh cross-interrogatory is true and the witness adopts it as his answer to his eleventh cross-interrogatory.

X Int. 12. Are you one of the original organizers of the company and one of its original officials?

In answer to the twelfth cross-interrogatory he says: That the answer of said Gibson to his twelfth cross-interrogatory is true and the witness adopts it as his answer to his twelfth cross-interrogatory.

X Int. 13. What voice had plaintiff Brahan in the management of the company. Did he participate in the organization of the company, or was he ever invited to any stock-holders' meeting?

In answer to the thirteenth cross-interrogatory he says: That the answer of said Gibson to his thirteenth cross-interrogatory is true

and the witness adopts it as his answer to his thirteenth cross-interrogatory.

X Int. 14. How often are the stock-holders' meetings held, and what class of stock-holders participate in the meetings?

In answer to the fourteenth cross-interrogatory he says: That the answer of said Gibson to his fourteenth cross-interrogatory is true and the witness adopts it as his answer to his fourteenth cross-interrogatory.

X Int. 15. What is your salary and what are your duties?

In answer to the fifteenth cross-interrogatory witness says: Five thousand dollars.

X Int. 16. Explain fully what the difference in the income of your company would be if instead of requiring borrowers to subscribe for stock and pay premium of 6% thereon and 6% interest on the loan, and in charging 12% per annum interest on the loan and allowing borrowers to participate in the profits of the association?

131 In answer to the sixteenth cross-interrogatory he says: That the answer of said Gibson to his sixteenth cross-interrogatory is true, and the witness adopts it as his answer to his sixteenth cross-interrogatory.

X Int. 17. Why is the borrower required to take stock?

In answer to the seventeenth cross-interrogatory he says: That the answer of said Gibson to his seventeenth cross-interrogatertory is true and the witness adopts it as his answer to his seventeenth cross-interrogatory.

X Int. 18. What goes with the dues, the premium and interest, respectively, as they are paid into the association? That is, how are they applied?

In answer to the eighteenth cross-interrogatory he says: That the answer of said Gibson to his eighteenth cross-interrogatory is true and the witness adopts it as his answer to his eighteenth cross-interrogatory.

X Int. 19. Give the total amount charged to expense account since the company begun business, specifying and itemizing so as to show amount of rents, amount of salaries, amount of taxes, amount of office expense and other items, making up the total.

In answer to the nineteenth cross-interrogatory he says: That the answer of said Gibson to his nineteenth cross-interrogatory is true and the witness adopts it as his answer to his nineteenth cross-interrogatory.

X Int. 20. State who, what officials, manage the association?

In answer to the twentieth cross-interrogatory he says: That the answer of said Gibson to his twentieth cross-interrogatory is true and the witness adopts it as his answer to his twentieth cross-interrogatory.

X Int. 21. State whether the association is under the control or supervision of any State department or official, and whether the association is required to make annual report to any such department or official? If yea, file with your answers copies of such reports as have been made to such department or official.

132 In answer to the twenty-first cross-interrogatory he says: That the answer of said Gibson to his twenty-first cross-interrogatory is true and the witness adopts it as his answer to his twenty-first cross-interrogatory.

X Int. 22. You are asked to state whether the department is a building & loan association or a loan association: Please say what a building & loan association is, as distinguished from a loan association.

In answer to the twenty-second cross-interrogatory he says: That the answer of said Gibson to his twenty-second cross-interrogatory is true and the witness adopts it as his answer to his twenty-second cross-interrogatory.

X Int. 23. Your association, the defendant, loaned money to its stock-holders on real estate without requiring the money to be used in the erection of buildings, did it not, and whether the borrower lived or proposed to live in the premises, did it not? Append to your answer a form of application for loan in use when plaintiff made his two applications.

In answer to the twenty-third cross-interrogatory he says: That the answer of said Gibson to the twenty-third cross-interrogatory is true and the witness adopts it as his answer to his twenty-third cross-interrogatory.

X Int. 24. State if you were present when Wm. Gibson's deposition was taken, and if you heard him testify, or have you talked to him about what he testified, or did you read his deposition before testifying.

In answer to the twenty-fourth cross-interrogatory, witness repeats, as hereinbefore stated, that he read the depositions of said William Gibson and was present when a portion of it was taken, and heard him give his testimony to a portion of it.

X Int. 25. Are your answers based on facts within your own knowledge, or on hearsay?

In answer to the twenty-fifth cross-interrogatory witness
133 says that his answers are based on facts within his knowledge.

GEO. PEET.

Filed Sept. 21, 1899.
W. D. CAMERON, *Clerk.*

In the Circuit Court of Lauderdale County, Mississippi.

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK.

This is to certify that under and by authority of the commission to me directed in the above styled case I caused the witnesses George J. Peet and William Gibson, each to come before me, in this city of New York, and having sworn them to testify the truth, the whole

truth, and nothing but the truth, I did carefully and impartially examine each of said witnesses on the interrogatories and cross-interrogatories, and caused the testimony to be fairly written down by a disinterested person in my presence, and subscribed by each of the said witnesses respectively; which testimony, together with the commission, interrogatories, and exhibits, I herewith return.

Given under my hand and seal of office in the city of New York this 2nd day of October A. D. 1899.

VINCENT ROSEMON,
Notary Public, New York City, N. Y.

The foregoing was all the evidence introduced on the trial of this cause.

Thereupon the plaintiff asked the court to grant instructions No. 1 which were refused by the court, to which action of the court the plaintiff then and there excepted.

134 No. 1.

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The court instructs the jury to find for the plaintiff in the sum of $1861.66 being the amount of principal paid in excess of both loans, less $73.90 the withdrawal value of shares of stock paid plaintiff by defendant in October 1894 with 6 % interest from July 7, 1899 to date.

Refused.

Filed Oct. 22, 1901.

W. D. CAMERON, *Clerk.*

Thereupon the court gave to the jury on behalf of the plaintiff the following instructions to-wit:

No. 2.

F. V. BRAHAN
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THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF N. Y. } 5324.

The court charges the jury to find for the plaintiff in the sum of the excess of $2000 paid the defendant by the plaintiff on the loan of $2000 made in June 1894, together with interest at 6 % interest per annum from July 7, 1899 to date.

Given.

Filed Oct. 22, 1901.

W. D. CAMERON, *Clerk.*

To the giving of each and all instructions the defendant by his attorney then and there excepted.

135 And thereupon the court gave to the jury on behalf of the defendant, the following instructions, to-wit:

No. 5324.

2. The court instructs the jury for the defendant that the contract in question made in May, 1892, is valid and not usurious, and that the plaintiff is not entitled to recover of defendant any sums paid by him to defendant on account of the loan made in May, 1892.

Given.

W. D. CAMERON, *Clerk.*

And defendant by its attorney moved the court to also give to the jury peremptory instruction for defendant as follows:

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NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION OF NEW YORK.

The defendant moves the court to instruct the jury to find for the defendant as per the instruction herewith shown the court:

1. Because the evidence shows each of the contracts in question to be a contract between a building & loan association and a borrowing shareholder, who was entitled under his contract to share and did share in the profits of the association, and the contract is therefore valid and not usurious.

2. Because the evidence shows that each of the contracts was made and consummated in the State of New York and is performable in the State of New York, and is to be construed by the laws of the State of New York, and that under the laws of New York said contract is valid and not usurious.

3. Because the evidence shows that at the time of making each of said contracts the plaintiff, F. V. Brahan, was a resident and citizen of the State of Mississippi, and the defendant association was then a resident and citizen of the State of New York, and

136 under the fourteenth amendment to the Constitution of the United States, the plaintiff had the right, as a citizen and resident of Mississippi, to become a member and shareholder in defendant association, and to procure a loan or advance upon his shares upon the terms and conditions of the articles of association, and particularly to make said contracts payable and performable in the State of New York; and the defendant association had the reciprocal right and was under obligation to make such loan or advances to the plaintiff upon the terms aforesaid, and had the right to have said contracts made payable and performable in the State of New York, and having done this, the defendant is entitled under said 14th amendment to have said contracts construed and their validity determined by the laws of said State of New York, where each of said contracts is performable;

And under section 1 of article 4 of the Constitution of the United States, the defendant is entitled to have this court give full faith and

credit, in determining the validity of said contracts, to the public acts, records and judicial proceedings of the State of New York, and particularly, chapter 122 of the laws of said State passed April 10th, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund association-," and the several acts amending the same, to-wit: chapter 564 of the Laws of New York of 1875, and chapter 96 of the Laws of New York of 1878; and the articles of association of the defendant, and the judicial decision in the case of Association *vs.* Read, 93 New York, 474, and the other decisions of said State of like tenor and effect, which hold that contracts like the contracts in question are valid and enforceable and not usurious under the laws of New York.

4. Because said contracts are valid and not usurious under chapter 13 of the Laws of Mississippi of 1886.

5. Because section 2348 of the Annotated Code of Mississippi, sought to be applied in this case, in so far as each of said con-
137 tracts is concerned is a law both *ex post facto* and impairing the obligation of said contract, and in violation of section 10 of article 1 of the Constitution of the United States.

6. Because the decision of the supreme court of Mississippi in the case of Sokoloski *vs.* New South B / L Association, 77 Miss. 155, and the decisions following that decision, all rendered long after the making of both said contracts, in so far as they undertake to set up and define the public policy of the State of Mississippi in regard to foreign building and loan associations, and their contracts with their members, are tantamount to judicial legislation, and in violation of section 10 article 1 of the Constitution of the U. S., in so far as both said contracts are concerned, being in effect the passage of a law both *ex post facto* and impairing the obligation of said contracts.

7. Because the evidence shows that both loans have been voluntarily repaid and settled by plaintiff with a full knowledge of all facts.

8. As to said last loan of Aug. 1894, because the evidence shows that prior to Nov. 1st, 1892 the plaintiff being then and there a citizen and resident of the State of Mississippi, became a shareholder in and member of defendant association, a corporation chartered under the laws of New York and domiciled in New York, where by under the articles of association of the defendant, the same plaintiff became then and there entitled to demand and receive of defendant an advance or loan upon his said shares upon the terms and conditions set out in said articles of association, when he should request the same, and the defendant then and there before said Nov. 1st, 1892 became and was under obligation to make said loan or advance to plaintiff when demanded upon the terms and conditions aforesaid; that the said loan of Aug. 30, 1894 was made by defendant to plaintiff on the shares aforesaid in pursuance of said contract of membership made and entered into prior to Nov. 1st, 1892, and in pursuance of said contract of membership and said articles
138 of association said contract of plaintiff to repay said loan was made payable and performable in said State of New York; wherefore sec. 2348 of the Annotated Code of Mississippi does not

govern said contract and is as to said contract a law both *ex post facto* and impairing the obligation of said contract and in violation of sec. 10 art. 1 of the Constitution of the United States; and under sec. 1 art. 4 of said Constitution and the laws of New York and the 14th amendment to said Constitution the said contract of Aug. 30, 1894 is valid and enforceable and not usurious.

9. For other reasons apparent to the court.

COCHRAN & BOZEMAN, *D. Att'ys.*

Filed Oct. 21, 1901.
W. D. CAMERON, *Clerk.*

139 F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION of N. Y. } No. 5324.

I. The court instructs the jury to find for the defendant.
Refused.
W. D. CAMERON, *Clerk.*

But the court refused to grant the motion and give this instruction to the jury, to which action of the court in refusing to give said instruction the defendant by its attorney then and there excepted.

And thereupon the jury rendered a verdict against the defendant whereupon the defendant by its attorney then and there moved the court to set aside said verdict and grant a new trial of this cause for the following reasons.

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Defendant by its attorneys moves the court to set aside the verdict of the jury and judgment herein, and for a new trial for the reasons following, to wit:

1. Because the court erred in refusing the peremptory *and* instruction asked by the defendant.
2. Because the court erred in denying defendant's motion for a peremptory instruction.
3. Because the court erred in granting the instruction asked by the plaintiff.
4. Because the verdict is contrary to the law.
5. Because the verdict is contrary to the evidence.
6. Because of other reasons apparent in the record.

COCHRAN & BOZMAN,
For Motion.

140 But the court denied the said motion and gave judgment on the verdict against the defendant; which decision of the court in denying such motion the defendant by its attorney then and there excepted.

Circuit Court, October Term, Saturday, Nov. 2, 1901.

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The motion of defendant to set aside the verdict of the jury and for a new trial, being considered by the court is over-ruled, to which action of the court the defendant excepts and the defendant is allowed 90 days within which to prepare and file its bill of exceptions.

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The plaintiff, by attorneys, moves the court to set aside the verdict of the jury in this cause, and grant him a new trial for the following reasons, to-wit:

1st. Because, the court erred in refusing instruction numbered I. as asked by plaintiff.

2nd. Because, the court erred in granting all the instructions asked by defendant, and particularly the instruction, denying plaintiff a recovery of the $735.00, excess paid defendant by plaintiff, under the loan dated May 21, 1892.

3rd. Because, the verdict is contrary to the law and evidence.

FEWELL & SON,
For Motion.

Filed Nov. 1, 1901.
W. D. CAMERON, *Clerk.*

141 Circuit Court, Oct. Term, Nov. 2, 1901.

F. V. BRAHAN
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NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION. }

The motion of plaintiff for a new trial herein having been considered by the court is over-ruled and said plaintiff is allowed 90 days in which to prepare and file a bill of exceptions.

And for as much as the matters set forth do not fully appear of record, the defendant tenders this his bill of exception and prays that the same may be signed by the judge of this court pursuant to the statute in such case made; which is accordingly done this 6th day of January, 1902.

G. Q. HALL, *Judge.*

Agreed to Jan. 6th 1902.

A. S. BOZEMAN,
Att'y for Def't.

F. V. BRAHAN &
WOODS, FEWELL & FEWELL,
Att'ys for Pl'ff.

Filed January 8, 1902.
W. D. CAMERON, *Clerk.*

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION of N. Y. } 5324.

This cause coming on this day to be heard, and thereupon came the parties by attorneys, and it appearing to the court that no traverse or plea to the attachment has been filed: It is therefore considered by the court that the attachment was rightfully sued out, and the same is hereby sustained. And thereupon came on to be heard the issue on the debt, and thereupon came a jury of good and lawful men to try the cause, to-wit:

E. Cahn and eleven others who after hearing the evidence
142 and arguments of counsel, retired to consider of their verdict, and presently returned into open court the following verdict, to-wit:

We, the jury, find for the plaintiff and assess his damages at $677.96 being the amount paid by plaintiff in excess of loan of $2000. made by defendant to plaintiff in June 1894 together with interest at 6 % interest per annum from July 7, 1899 to date, being $93.79 aggregating the sum of $771.75. It is therefore considered by the court that the plaintiff do have of and recover from the defendant, The National Mutual Building & Loan Association, a corporation under the laws of the State of New York, the said sum of ($771.75) seven hundred and seventy-one 75/100 dollars, together with all costs in this behalf expended for which let execution issue.

And it further appearing to the court, that the attachment writ in this cause was levied on the following described lands situated in the city of Meridian, Lauderdale county, Mississippi, to-wit: Block 61 according to Ball's survey of the city of Meridian, together with all improvements thereon; also all that lot, piece or parcel of land with the improvements thereon described as beginning at the northwest corner of block 13, according to Ball's survey of said city of Meridian, and running thence south along 31 avenue 157 feet, thence east 117½ feet, thence north 157 feet, to the southerly side of 11th street, thence west along 11th street 117½ to the point of beginning. It is therefore considered by the court that the said property above described be and the same is hereby condemned and ordered to be sold to satisfy said plaintiff and all costs of this suit for which let special execution issue.

Ordered October 22, 1901.

W. D. CAMERON, *Clerk.*

143 In the Circuit Court of Lauderdale County, Miss.

F. V. BRAHAN
vs.
THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF New York.

The said National Mutual Building and Loan Association of New York feeling itself aggrieved at the final judgment rendered in said

cause by the circuit court of Lauderdale county, Mississippi, on the 22nd day of October 1901, at the October term thereof in favor of said F. V. Brahan and against said National Mutual Building and Loan Association for $771.75 and costs, prays an appeal therefrom with supersedeas to the next term of the supreme court of this State and tenders herewith its supersedeas bond in the penalty of $1550.00 conditioned according to law.

A. S. BOZEMAN,
Of COCHRAN & BOZEMAN,
Attorneys for Defendant.

Filed December 23rd 1901.
W. D. CAMERON, *Clerk.*

THE STATE OF MISSISSIPPI, }
Lauderdale County. }

Know all men by these presents, that we, The National Mutual Building and Loan Association of New York, principal and The American Surety Company of New York, a corporation as surety, are held and firmly bound unto F. V. Brahan in the penal sum of fifteen hundred and fifty dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these present-, the 16th day of December, A. D. 1901.

That condition of the above obligation is such, that, whereas, in a case lately pending in the circuit court of Lauderdale county, wherein said F. V. Brahan was plaintiff, and said National Mutual Building and Loan Association of New York defendant, a judgment was rendered on the 22nd day of October, 1901, a day of the
144 October term, 1901, of said circuit court of said county, in favor of said F. V. Brahan against said National Mutual Building and Loan Association for seven hundred and seventy one 75/100 dollars and costs and the said National Mutual Building and Loan Association of New York conceiving itself aggrieved thereby hath prayed for and obtained an appeal to revise and reverse said judgment returnable to the next term of our supreme court.

Now, therefore, if the said obligators shall pay and satisfy the judgment complained of and also such final judgment as may be made in the cause and all costs in case the judgment be affirmed, then this obligation to be void, otherwise to remain in full force and effect.

NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
By WILLIAM GIBSON, *Secretary,*
CHARLES B. PEET, *President.*
AMERICAN SURETY COMPANY OF NEW YORK,
By H. B. ZEVELY, *Vice-President,*
CORTLANDT S. VAN RENSSELAER, *Attorney.*

STATE AND COUNTY OF NEW YORK, *ss:*

On this 16th day of Dec. 1901, before me personally appeared H. B. Zevely vice-president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; and that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporation seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation; and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said H. B. Zevely further said that he was acquainted with Cortlandt S. Van Rensselaer and knew him to be one of the attorneys of said corporation, that the signature of said Cortlandt S. Van Rensselaer subscribed to the said instrument, is in the genuine handwriting of the said Cortlandt S.
145 Van Rensselaer, and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said H. B. Zevely vice president.

MARSHALL L. BROWER,
Notary Public.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"Resolved, That the president and vice-president be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, *ss:*

I, Courtlandt S. Van Rensselaer, attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and seal of the company at the city of New York, this 16th day of December, 1901.

CORTLANDT S. VAN RENSSELAER, *Attorney.*

146 STATE OF NEW YORK, } ss:
County of New York, }

Cortlandt S. Van Rensselaer being duly sworn, says: That he is an attorney of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company of New York is worth more than $2,500 over and above all its debts and liabilities and such exemptions as may be allowed by law.

COURTLANDT S. VAN RENSSELAER.

Subscribed and sworn before me this 16th day of December, 1901.

MARSHALL L. BROWER,
Notary Public.

American Surety Company of New York.

Financial Statement, Sept. 30, 1901.

Resources.

Real estate and improvements	$3,054,567.16	
Stocks and bonds	1,792,383.75	
Bills receivable	85,628.27	
Cash in banks and offices	229,793.16	
Premiums in course of collection	237,536.40	
Accrued interest and rents	29,123.23	
		$5,429,031.97

147 Liabilities.

Capital stock	$2,500,000.00	
Surplus	1,000,000.00	
Undivided profits	1,068,651.90	
Premium reserve requirement	607,227.50	
Claims in process of adjustment	183,976.99	
Bills and accounts payable	69,175.58	
		$5,429,031.97

Filed Dec. 23, 1901.
W. D. CAMERON, *Clerk.*

STATE OF MISSISSIPPI, }
Lauderdale County. }

I, W. D. Cameron, clerk of the circuit court in and for said county and State do hereby certify that the foregoing 154 pages contain a full, true and perfect transcript of the record, pleadings, proceedings and judgment of the case of F. V. Brahan *versus* the National Mutual Building & Loan Association of New York as the same appears on file and of record in my office.

Given under my hand and seal of office, this the 21st day of February, 1902.

[SEAL.] W. D. CAMERON, *Clerk.*

148 The State of Mississippi to the sheriff of Lauderdale county, in said State:

You are hereby commanded to summon F. V. Brahan appellee, or his attorney in fact or of record, if to be found in your county, to appear before the supreme court of the State of Mississippi, at the capitol, in the city of Jackson in the county of Hinds, and State aforesaid, on the 3rd day of March A. D. 1902 then and there to answer the appeal of The National Mutual Building and Loan Association from a judgment of the circuit court of the county of Lauderdale in said State, rendered against said appellant on the 22nd day of October A. D. 1901 at the October term A. D. 1901 of said circuit court, in favor of said appellee for the sum of seven hundred and seventy one and 75/100 dollars with 6 % interest from date of said judgment. Bond for supercedeas having been filed herein.

And have there then this writ.

Given under my hand and the seal of said circuit court
[SEAL.] at my office in Meridian Miss., and issued this the 8th day of February, A. D. 1902.

W. D. CAMERON,
Circuit Clerk.

149 I hereby specially deputize Thos. P. Brown to execute and return the within writ. This Feb'y 12th, 1902.

R. H. JEMISON, *Sh'ff.*

I have this day executed the within writ personally by delivery to F. V. Brahan — a true copy of the within writ. This Feb'y 12/02.

R. H. JEMISON, *Sh'ff,*
By THOS. P. BROWN, *D'p't.*

150 THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION of New York, Appellant,
v.
F. V. BRAHAN, Appellee.

Assignment of Errors.

Comes the appellant by its attorney and makes the following assignment of errors:

1. The court below erred in overruling the motion of appellant (defendant below) for leave to amend its notice under the general issue and in striking out the amendments filed by defendant, below of date April 20th and August 6th, 1901.
2. The court below erred in overruling the appellant's motion for a peremptory instruction.
3. The court below erred in refusing the peremptory instruction asked by appellant.
4. The court below erred in granting the peremptory instruction asked by appellee.
5. The court below erred in overruling the appellant's motion for a new trial.
6. The verdict and judgment below are contrary to the law and the evidence.

A. S. BOZEMAN,
Att'y for Appellant.

Endorsed: Filed March 4, 1902. E. W. Brown clerk by W. J. Brown Jr. D. C.

151 And on the 19th day of March, 1902, a day of the regular March term, A. D. 1902, the following order was made:

NAT'L MUTUAL B. & L. ASSOCIATION
v.
F. V. BRAHAN. } 10416.

Submitted on briefs, by A. S. Bozeman, for appellant, and Geo. B. Neville and F. V. Brahan, for appellee.

And on the 7th day of April, 1902, being a day of the regular March term, A. D. 1902, the following final judgment was rendered by the supreme court in said cause, to-wit:

NATIONAL MUTUAL B. & L. ASSOCIATION
v.
F. V. BRAHAN. } 10416.

This cause having been submitted on a former day of this term, on the record herein from the circuit court of Lauderdale county, and this court having sufficiently examined and considered the same, and being of opinion that there is no error therein, doth order

and adjudge, that the judgment of said circuit court, rendered in this cause at the October term thereof, A. D. 1901, be, and the same is, hereby affirmed on direct appeal, and reversed on cross-appeal, and that appellant, and the American Surety Company, of New York, surety, do pay to appellee, the sum of seven hundred and seventy-one & 75/100 dollars, being the amount of the judgment in the court below, with interest at six per cent. per annum, from the date of said judgment until paid; and the further sum of $38 & 58/100, being 5 % statutory damages on appeal, together with the costs of this cause in this court and the court below, to be taxed, &c.

152 NAT. MUTUAL B. & L. ASSOCIATION *v.* F. V. BRAHAN. } 10416.

WHITFIELD, *C. J.*:

This case is controlled on the direct appeal, as to the loan made under the Code of 1892, by the cases of Nat. B. & L. Ass'n &c.—this same appellant—*v.* Wilson, 78 Miss. 993; Shannon *v.* Georgia St. B. & L. Ass'n, 78 Miss. p. 955, and the authorities therein cited; and B. & L. Ass'n *v.* Burch (May 1900) 124 Mich. at p. 63, wherein this very appellant was appellant there, and the same conclusion reached by us in the first two cases above, was reached by the supreme court of Michigan, the court saying:

"It is said the contract is a New York contract, and must be governed by the New York law, and for that reason can be enforced. We do not think it at all clear this is a New York contract, or that it was so understood to be when it was made, while by the terms of the mortgage the loan was to be paid in New York, it was expected the money would be paid to the treasurer of the local branch at Muskegon, and most of it was paid to him." And emphatically to the same effect are the very thoroughly considered cases of Investment Ass'n *v.* Stanley, 38 Oregon, p. 340, (decided in 1901), and Saving Ass'n *v.* Kidder, 9 Kansas Appeals p. 390 (decided in 1899) and So. B. & L. Ass'n *v.* Atkinson, 20 Texas Civil Appeals, 516.

In Stanley's case, *supra*, at page 340–341, Judge Wolverton, in the course of a masterly opinion, says with great power:

"The plaintiff contends, however, that the agreement must be treated as a Washington contract, and therefore should be construed with reference to the usury laws of that State, and incidentally, that the transaction of making the loan, and taking a note payable at Seattle, Washington, and a mortgage upon lands in Oregon, to secure its payment, was not doing business within this State. It is strange reasoning to insist, on the one hand, that in order to enable the plaintiff to sue in our courts, it has complied with the law with that particularity which will enable it to do business in the State, and yet, when it is suggested that it has violated the laws of usury here by a transaction consummated under the same authority that authorizes the suit, to insist that it has not done business within the State. The very purpose of the act is to enable those associations having their

domiciles in other States to do and transact business and sue and
153 be sued here, and it ought to be alike effective under all conditions. When they come here under the statute, and have the license of the secretary of state to do business here, they *become pro hac vice domestic corporations*, and must operate as if *actually domiciled in the State*. They submit and render themselves amenable to the laws of the State, which must be taken to govern all their transactions entered into and consummated therein. Our own citizens would not be permitted to make contracts here payable in another State, and then insist upon having them construed here according to the laws of such State; and it does not seem consistent with principle and reason that a foreign corporation, securing citizenship in this State for the purpose of promoting its business, can insist upon making its contracts payable elsewhere, and then invoke the authority and process of our courts to enforce them according to laws other than our own. If such were to be recognized as good law, it would in many instances give foreign corporations, although domiciled in this State, advantages over those organized under its laws, and having their principal place of business here. But the transaction, under the conditions attending it, must be regarded as doing business within this State: Bank of British Columbia *v.* Page, 6 Or. 431; Hacheny *v.* Leary, 12 Or. 40 (7 Pac. 329); Cooper Mfg. Co. *v.* Ferguson, 113 U. S. 727 (5 Sup. Ct. 739).

The contract was made in Oregon, and must be construed and enforced according to our laws. The application for stock and the loan was made in Oregon, to and by an association domiciled and doing business therein, through a resident solicitor. The mortgage was given upon an Oregon farm, and was executed and acknowledged here. The money was used here, and this suit was instituted in the county in which the mortgaged premises are situated, as contemplated by the association when it acquired the license to do business in the State. All this, *notwithstanding the mortgage stipulation to the effect that it is a Washington contract*, clearly shows its Oregon nativity, and it is therefore solvable by the laws thereof: Merony *v.* Atlanta B. & L. Ass'n 116 N. C. 882 (47 Am. St. Rep. 841, 21 S. E. 924); Martin *v.* Johnson, 84 Ga. 481 (10 S. E. 1092, 8 L. R. A. 170); Dickinson *v.* Edwards, 77 N. Y. 573 (33 Am. Rep. 671); Jackson *v.* American Mfg. Co. 88 Ga. 756 (15 S. E. 812)."

All this is in exact line with what we held in Shannon's and Wilson's cases, as to what constituted "doing business" in a State,
and as to the clear duty of the court to go behind the paper
154 recital to the actual fact of the case, as to the board being the agent of the company and the money being really payable here.

In Kidder's case the whole contract was made by correspondence through the mail—there was not only no local board, but not even an agent of the corporation in Kansas, and yet the court said:

"These contracts were entered into by correspondence; they were drawn by plaintiff in New York and sent to defendants at Scandia, who executed and returned them to the plaintiff. All payments were to be made to the secretary of the association at Geneva

N. Y. * * * The contract for the purchase of stock and for the loan of money was made by correspondence between Kidder, in the State of Kansas, and the association, in New York; the place of performance as fixed was at the office of the association in the latter State. This contract, so far as its language could control, was entered into with reference to the laws of the State of New York, and was to be there performed; that is, the purchase price of the stock and the principal and interest upon the loan were to be paid at the association's office. However, the mortgage could only be enforced in the State of Kansas. A contract usually is entered into with reference to the laws of the State or country where it is made, or to be performed, but where a contract must be enforced in a particular place, the laws of that State may apply to such provisions of the contract as are in conflict with the laws thereof. In the foreclosure of a real estate mortgage, the usury law of the State in which the land is situated will govern, although payment of the loan in another State is provided for by the terms of the contract. The contract amounts to an evasion of the usury laws, and it cannot be enforced. * * * It seems, however, that while the association desires to claim all the benefits of a New York contract as an abstract proposition, it desires the courts of this State to enforce the same as a Kansas contract, for the purpose of enabling it to secure the foreclosure of its lien upon Kansas soil for the payment of a usurious contract. This contract made as it was by correspondence, with a view of being enforced in this State, is a Kansas contract."

This goes far beyond our holding in the Shannon and Wilson cases. In Atkinson's case in 20 Texas Civil App. 516, (decided in 1899) the court holds the local boards the agents of the company, and the notes Texas contracts, on the evidence, notwithstanding recitals to the contrary in the contract. It looked, as we did, to the actual facts.

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We add these very recent, and well-considered cases to those cited in Shannon's and Wilson's cases, 78 Miss. They support fully in every particular, the law as announced by us in those cases. And we call special attention to the fact that in Stanley's case, the cases of Allgeyers, 165 U. S. 578, and Eastern B. & L. Ass'n *v.* Bedford were cited and relied on, without avail—see brief of counsel 38 Oregon 326. The judgment on the direct appeal is therefore affirmed.

On the cross-appeal, as to the loan made under the act of 1886, the case of this same appellant *v.* Pinkstan, controls. (79 Miss.). The judgment on the cross-appeal is therefore reversed, and the cause as to that loan, remanded to be proceeded with in accordance with the opinion this day delivered in Nat. &c. *v.* Pinkstan.

We desire, in passing upon the merits of the case, to say for the satisfaction of learned counsel for appellant, that we have both in this case, and in the case of Shannon *v.* this same appellant, and Wilson *v.* this same appellant—both reported in 78 Miss.—carefully considered the opinion of Judge Hammond in 88 Fed. Rep. p. 7, and Judge McKenna in Bedford *v.* Eastern B. & L. Ass'n 181 U. S. 237.

The difference between that case and this, and the Shannon and Wilson cases, *are* great and obvious. The statutes of this State construed by us in Shannon's case, and Wilson's case are wholly different from the act of the legislature of Tennessee passed March 26th 1891, and from chapter 2 of the Acts of 1891, Laws of Tenn. and the facts in this, and Shannon's case, and Wilson's case, are very much stronger for appellee than in Bedford's case. The precise question for decision in Bedford's case is thus stated in Bedford *v.* Eastern B. & L. Ass'n 181 U. S. at p. 237; the assignments of error present the question of the enforcibility of the notes and mortgages under the Tenn. law, "or as the question may be put, whether, there was a contract between the parties, a right in one, and an obligation in the other, arising from a consideration given and received; mutual covenants by which each party acquired the right to that which the other promised or engaged to do, and whether the laws of Tennessee as interpreted by its courts impaired that right." The question is again stated by the court at
156 page 240 thus: "The statutes of Tennessee relied on as a defence were passed March 26th, 1891, and to repeat, the question is, did the subscription to the stock of the association, its issuance and the application for a loan in pursuance of it, constitute a contract which was inviolable by the State legislature? We think the answer should be in the affirmative." The facts were shown to be, so far as decision is concerned, that Bedford made his application for a loan on the 20th of March 1891; and that the business of the association in Tennessee, which business it had been there carrying on was lawful at that time and up to March 26th 1891, when the legislature of the State of Tennessee passed chapter 2, p. 122 of the Acts of 1891, prescribing the terms and conditions on which foreign corporations might do business in that State; that on the same day the legislature passed chapter 2 of the Acts of 1891 providing certain conditions, compliance with which the legislature made a condition precedent to the right of foreign building and loan associations to do business in that State, one of the conditions being that such foreign building and loan associations should "deposit and continually thereafter keep deposited, in trust for all of its members and creditors, with some responsible trust company, or with some State officer of this, or some other State of the U. S., mortgages, or other securities, received by it in the usual course of its business amounting to not less than $25,000, nor more than $50,000 at the discretion of the State treasurer."

The facts in the case show, as is clearly pointed out by Mr. Justice McKenna,—that the contract was made and completed by Bedford's subscribing to the stock of the association, and prior to the passage of both these statutes. And the facts further show that the supreme court of Tennessee, in U. S. *v.* Miller, 47 S. W. R. 17, which was affirmed on appeal by the supreme court of the State of Tennessee, Dec. 18th 1897, (and it will be specially noted, without written opinion), held that a contract, similar to the contract in Bedford's case, was a New York contract. This had also been held by the

supreme court of Tennessee in Pioneer B. & L. Company *v.* Cannon, 96 Tenn., 603, without any citation of authorities.

Note that it seems to have been conceded in that case that
157 the contract was a Minn. contract, and no point was made as to that. The facts, however in Pioneer B. & L. Co. *v.* Cannon are very different indeed from the facts in Bedford's case, the facts in Miller's case and the facts in this case.

The precise point decided therefore in Bedford's case in 181 U. S. was simply and only this, that inasmuch as the contract of loan had been fully made prior to the passage of the two Tennessee statutes involved a reciprocal fixed and vested right on Bedford's part to demand the loan and on the company's part to require him to complete the loan, had attached prior to the passage of the acts, the obligation of which contract so made prior to these statutes, it was not within the power of the State of Tennessee, by legislation, to impair. That, that precisely—and nothing more or less than that, was what was decided in Bedford's case, and was all that was decided in Bedford's case. Any observations of the court in 88 Fed. Rep. p. 7, beyond what was thus decided, were not necessary to decision and were mere *obiter dicta*. We understand Bedford's case as decided in 181 U. S. to be in perfect harmony with our decision in Shannon's case and Wilson's case, 78 Miss. We put the decision in Shannon's case as follows (see p. 964): "The chief point of contention is whether this is a Georgia or a Mississippi contract. It is true the notes were payable in Georgia, but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. All the payments through a series of years, were actually made in Mississippi, instead of Georgia, to the local treasurer here, and it is manifest it was intended they should be made here. This foreign corporation had the power to organize local boards throughout Georgia and other States. It did organize a local board, thoroughly officered, at Ellisville, in this State, and to the appellant and his vendor, and by other members of this association, through a series of years.

It is obvious that this foreign corporation has thus localized its Mississippi business within the State of Mississippi. It is not a case of a non-resident money lender, or a foreign corporation, in a few isolated cases dealing with our citizens and taking notes payable in the State of the domicile of such person or corporation. It is a case
of a localization within this State of a large business done by
158 a foreign corporation on the security of mortgages on land in this State, the payments to be made to the secretary and treasurer of their respective local boards scattered throughout the State. Where ever, under circumstances, such as these, the foreign corporation, thus localizing its business within this State, has the payment made to the secretary or treasurer of a local board, the real intention of the parties is that the payments shall be made in this State, and the only purpose of reciting the contrary in the notes is to evade the usury laws of this State. The contract is a Mississippi contract according to the real facts and the real intention of the parties. Courts look through all disguises to the real case made by

the actual facts." And again on page 970: "And it is immaterial whether the foreign corporation is doing business under a license here or has, without such license, localized its business and domesticated itself here as to such business. And the Acts of 1890, p. 10, places, "each branch office" and "each agency" on the same footing exactly, treating each as a separate and distinct building and loan association, and taxes each as such.

The general doctrine is, of course, well settled that the law of a place where the contract is to be performed, governs the contract; and the presumption that this contract was to be performed according to the laws of Georgia, simply because the notes were payable in Georgia, is, at last nothing but a mere presumption to that effect, subject to be overcome by proof that, in truth and in fact, they intended the money to be paid in Mississippi. When all there is, in a case like this, to show that the intention was to perform the contract in a foreign State, is a mere specious paper recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any court, to find the real intention of the parties in the paper recital, instead of in the real facts of the case.

It must be remembered that the State has the power to prescribe the terms on which foreign corporations may do business. It is declared in § 849 of the code of 1892, last clause, "such foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy." This is the plain mandate of our law, which must be rigidly enforced by
159 the courts. And the code otherwise provides that (§ 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them, and to enforce this public policy, thus declared by the statute, is not to give extra territorial operation to our statutes. On the contrary this corporation has come into the State, localized its business here, through local boards scattered all over the State, and must submit such business thus localized to the operation of the laws of the State. To hold otherwise, would operate the grossest injustice to our citizens, and would virtually abrogate our statutes against usury." And again on p. 974: "Foreign corporations wishing to do business with our citizens, and localizing that business within our State through local boards, must comply with the laws of this State. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the State which created them, if these stipulations violate our laws or public policy. Such laws of such foreign States can have, *ex proprio vigore*, no extra territorial effect, and it is not competent for a foreign corporation, whose business has been localized in this State, or the borrower, or both, to abrogate by attempted contract, stipulations whose purpose it is to evade our laws against usury—the laws of this State on that subject.

This holding in no way interfer-s with the right of a foreign cor-

poration whose business has not been localized here, to make contracts with borrowers, to be governed by the laws of the State of their domicile, if there be no purpose therein to evade the usury laws of this State. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to Bank of Newport *v.* Cook, 46 Am. St. Rep. 171. In that note the learned editor points out, on page 202, the distinction to be observed saying:

"The proper answer to this argument is, that mere shams and evasions are not permitted to counteract and annul the law, and where it appears that the purpose of the parties in making the obligation payable in another State was to evade the laws against usury of the State in which it was executed, it will be regarded as infected with usury."

And in that decision we supported our conclusion by authorities drawn from many States to which we again refer, and which we again approve. Now it is perfectly plain, to the most casual observation, that the point on which the Shannon case hinged, which was sup-
160 ported by the facts in that case, and by the authorities cited—was not even presented to the court—either to the judge of the circuit court of the U. S. in 88 Fed. Rep., or to the U. S. Supreme Court in 181 U. S. *supra*. There was not a suggestion of this point in that case as presented either in the lower court or the supreme court, nor was any such point presented, in any manner, in any of the cases previously cited from the supreme court of Tennessee. In other words, the facts in Shannon's case, a Mississippi case, presented a ground for decision under the statutes of this State, not even hinted at in Bedford's case or Miller's case, or Cannon's case in 99 Tenn. or the other Cannon case in 96 Tenn.; and that ground of decision was, that the foreign corporation had many local boards scattered throughout this State, which local boards were the agents manifestly of the corporation, through which boards the corporation had been for years transacting business in this State, making large numbers of loans, involving large sums of money, and had thus localized its business here, and had domesticated itself as to that business within this State. The very converse of this, it clearly appears, was true in Bedford's case. Mr. Justice McKenna takes pains to point out, at p. 236, that after the passage of the acts of March 26th 1891 the loan company transacted no further business in Tennessee—no new business—confining itself strictly,—so as to avoid the statute—to completing loans contracted prior to the passage of these acts, and at p. 241 says: "It might indeed have the right to decline any condition and retire from the State, and from all it had the option to retire from. But it could not retire from the execution of its contracts. It contracted with Bedford to make him a loan, if it had the means in its treasury, and his security was good. The State could not affect that obligation nor impair it. * * * We recognize the power of the State to impose conditions upon foreign corporations doing business in the

State. We have affirmed the existence of that power many times, but manifestly it cannot be exercised to discharge the citizens of the State from their contract obligations." Language could not more plainly say that the only point decided in the case was, that, in as much as Bedford and the company had already completed their contract, before these acts were passed the legislature could not by a subsequent act impair the contract; there is not the slightest suggestion in the opinion of the court that the facts
161 on which the opinion in the Shannon case was based, were ever presented to the court. Again the Supreme Court of the U. S. very naturally followed the supreme court of Tennessee, as to there being no usury in the Bedford contract, since that court in the light of the contract in the Pioneer case, had held that a similar contract made in Tennessee, payable in Minn. was a Minn. contract, and had also held the same in the Miller case *supra*. What the Tennessee supreme court thus held in construction of the contracts in those cases, and also in construction of their usury statutes, the Supreme Court of the U. S. properly followed, under the well settled doctrine that that court will always follow the interpretation put upon State statutes—merely local laws—by the supreme court of the State whose statutes they are dealing with. Under our statutes, which are materially different—as is shown in Shannon's case from the statutes of Tennessee—and under the facts in this case and Shannon's case and Wilson's case—which in all these cases are vitally different from the facts in Bedford's case, we hold the contracts are usurious, and in so holding we are doing nothing more nor less than construing our own statutes as to usury, and our statutes imposing privilege taxes on "each branch office" and "each agency" of a foreign building and loan association—See Laws 1890 p. 10; Shannon's case 78 Miss. 970. Further more, it is made perfectly plain by Mr. Justice McKenna that the supreme court of Tennessee, in Cannon's case 99 Tenn. and in Miller's case, 47 S. W. R. *supra*, held that the contracts were not Tennessee contracts, but that they were nevertheless void, because the foreign corporations had not complied with the terms and conditions prescribed by the legislature of Tennessee, upon compliance with which alone they were authorized to do business in that State. The Sup. Ct. of the U. S., therefore, in the Bedford case had no trouble in finding the contract a New York contract, because they simply followed the supreme court of Tennessee. That therefore was not the point of decision. The respect in which it reversed the supreme court of Tenn. was merely in its holding that the borrower did not have a vested right to the loan nor the association a legal right (see 99 Tann. p. 348) to have it consummated, even though the contract had been completed prior to the passage of the acts of March 26th 1891. One other thing is to be distinctly noted, that the Supreme Court of the U. S. does not approve all that is said by Judge Hammond in 88 Fed. Rep. p. 7. If we pass by some
162 of the rather heated expressions in that opinion, as for instance those in which he speaks of the "vaunted police power of a State," and those in which speaking of the public policy declared

by the legislature of the State of Tennessee, he says that "possibly the oft reiterated charge that the real purpose of the legislation was to make fees for the registration officers in the different counties may furnish a clue to the kind of public policy which is the foundation of the legislation,"—expressions thrown off unadvisedly, *currente calamo*, we will see that Judge Hammond himself, at p. 13 and 20 of his opinion states the proposition, in harmony with Shannon's case, as follows: "Foreign corporations that desire such domestication must comply with the provisions of these statutes, and if they carry on their business in the same manner that domestic corporations do, and make their contracts to be performed within the State of Tennessee without compliance with these acts, then they are within the pains and penalties of the statutes. But if they confine their business to their own home places, make their contracts there, to be performed there, as was done in this case, they are not within the pains and penalties of the acts, and such contracts are not affected by them. As to such contracts, it is not within the power of the State to discharge or suspend their obligations." If the learned judge had confined his decision to what he here, and at page 13, says correctly, was the question for decision, to-wit: whether the acts of the Tennessee legislature could suspend or discharge the obligation of this contract made before their passage, he would have relieved us of the necessity of reviewing his opinion on two or three points, which we shall now note. First: He holds that the local boards are agents of the borrower; the direct contrary of this was held in the unanswerable opinion of Justice Brown in Knights of Pythias *v.* Withers, 177 U. S. 260, followed by us in Murphy *v.* Independent Order etc. 77 Miss. 830, and Shannon's case, 78 Miss. 975. The obvious fallacy of the reasoning of the learned judge is that he treats the mere specious paper recital in the contract that the local boards are the agents of the borrowers, as conclusive of that fact; when plainly such recital furnishes nothing but a mere presumption that that is true. It is a mere presumption, and subject, like all such presumptions to be overcome by proof to the contrary. And where as in Shannon's case, the testimony of the witness shows clearly that the local boards were
163 scattered all over the State, and that it had been the practice for years for these local boards to receive all payments, and solicit loans, all this solicitation and payment of money, taking place in this State, these boards all the while acting in everything they did under the orders of the company, and for the company, it is an affront to common sense, to deny what is thus made plain, that both parties meant and understood those boards to be the agents of the company, and the money to be payable in Mississippi. Whether one is the agent of another depends not on any mere paper recital—which may easily be worded to hide the real purpose—but on his acts, what he actually does. If his actual conduct, his actual doings every day for years, shows he is acting as agent for the company, then courts would be weak indeed, which should hold, against these facts, that he was agent for the borrower, simply because there was a fraudulent paper recital to that effect. And all these observations

apply with equal force to the mere recital that the notes were to be payable in New York. What we have said in the Shannon case on this subject we re-affirm, and refer again here to the authorities from other States on this point, there cited. It is doubtless an extremely easy method of escaping the labor of investigation to say that local boards are the agents of the borrower, and the monies are payable in New York, simply because the paper recital says so. But courts discharge their whole duty only when they look deeper than prepared recitals, to the actual facts of every case. Suppose it were true, in a given case, that the intention to pay in the foreign State was really true as recited at the inception of the contract, is it possible that it can be contended that it is not in the power of the parties to discharge that feature of the original contract by a long course of dealing to the contrary? How much stronger is the case when the original recitation was made to evade the positive statute law of a State, and manifestly for no other purpose—the whole course of dealing from the inception of the contract demonstrating this beyond doubt? Second: He says on page 16 "It is decided in Allgeyer's case that it can be enforced if the contract is made through the agency of the mails." With all deference, we hold that nothing of the sort was decided in Allgeyer's case. On the contrary Mr. Justice Peckham in that opinion, 165 U. S., p. 587, says: "In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing
164 that the facts show was done within that State, was the mailing of a letter of notification, as above mentioned, which was done after the principal contract had been made." Again at page 588 he says: "We have then a contract which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana, being made and to be performed with in the State of New York, where the premiums were to be paid and losses, if any, adjusted. The letter of notification did not constitute a contract made or entered into within the State of Louisiana. It was but the performance of an act rendered necessary by the provisions of the contract already made between the parties outside of the State. It was a mere notification that the contract already in existence would attach to that particular property" Again he says at page 592: "The giving of the notice is a mere collateral matter; it is not the contract itself, but is an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State." The learned judge—whom we hold in the highest esteem—has manifestly misconceived Allgeyer's case. Another misconception of his is this: he says at page 16 "I suppose it would be agreed that if the defendant had made the same contract through the agency of the express company, it would not have been illegal; or if he had put a messenger on the cars, and sent him with a power of attorney to the city of New York, it would not have been illegal. Now, why is it any more illegal to negotiate through persons in Tennessee who are willing to take the burden of attending to the details, and transmitting their correspondence through the mails?" This is answered completely in the language

of Mr. Justice White in Hooper *v.* California, 155 U. S. p. 658: "It is said that the right of a citizen to contract for insurance for himself is guaranteed by the fourteenth amendment, and that, therefore, he cannot be deprived by the State of the capacity to so contract through an agent. The fourteenth amendment, however, does not guarantee the citizen the right to make within his State, either directly or indirectly, a contract, the making thereof is constitutionally forbidden by the State. The proposition that, because a citizen might make such a contract himself beyond the confines of his State, therefore he might authorize an agent to violate in his behalf the laws of his State, within her own limits, involves a clear *non sequitur*, and ignores the vital distinction be-
165 tween acts done within and acts done beyond a State's jurisdiction." This language is quoted and re-affirmed in Allgeyer's case by Justice Peckham at page 588. The learned judge in 88 Fed. Rep. confuses the case of a single isolated borrowing—as Allgeyer's case—with "doing business" in the State—a very different thing indeed. The dissenting opinion in Hooper's case, 155 U. S. shows at page 661 this very difference, the dissenting justice saying: "This single act of the company cannot be held to prove that it proposed to transact business in that State, or that it contemplated the issuing of any other policy to a resident of California. * * * Indeed, the prosecution in the present case manifestly had in mind the difference between a single act of insuring property and "proposing to transact insurance business by agent or agents." Again at the bottom of the page it is pointed out "as an abridgement of the privileges, not of a foreign corporation, but of individual citizens of other States &c." we are not dealing in this case with a single individual citizen borrowing from appellant having made his contract out of the State in New York, and giving them notice, collaterally by mail, or not, we are dealing with the case of a foreign corporation transacting an immense business in the State, through a large number of local boards of control—its own agents manifestly—such foreign corporation having thus localized its business in this State, and having—precisely as was done in Oregon, Stanley's case *supra*—become domesticated here, as to that business. If on facts like these, under statutes such as we have on usury, and the laws taxing "each local board" or "branch" or "agency" of a foreign building and loan association, the State has no power to declare this contract violative of our statutes and public policy, then indeed is the boasted authority of a State to prevent infraction of its positive statute law, and its public policy by a foreign corporation of another State—a meaningless platitude—a veritable mockery. But we find and quote, to give it our most unqualified endorsement, a most able statement of this view in the Supreme Court of the U. S. in Hooper *v.* California, 155 U. S. page 658, where the court through Mr. Justice White say: "If the contention of the plaintiff in error were admitted, the established authority of the State to prevent a foreign corporation from carrying on business within its limits, either absolutely or except upon certain conditions, would be destroyed. It would be only necessary for such a corporation to have

an understanding with a resident that in the effecting of con-
166 tracts between itself and other residents of the State, he should be considered the agent of the insured persons, and not of the company. This would make the exercise of a substantial and valuable power by a State government depend not on the actual facts of the transactions over which it lawfully seeks to extend its control, but upon the disposition of a corporation to resort to a mere subterfuge in order to evade obligations properly imposed upon it. Public policy forbids a construction of the law which leads to such a result, unless logically unavoidable." There is no such vagueness about the phrase "doing business within the State," or "negotiating business within the State,"—no "such ambiguity or elasticity in its quality," as seems to be apprehended by the learned judge in 88 Fed. Rep. at page 17, we humbly submit. The U. S. Supreme Court has made the meaning of that phrase to our thinking, clear as light. This appellant was "doing business in this State" within the definition of that phrase by the Federal Supreme Court, and doing it through its own agents,—its local boards,—as held by the Federal Supreme Court in Knights of Pythias *v.* Withers *supra*. We refer again here to the citation from Stanley's case in the opening of this opinion, as to what constitutes "doing business in a State."

We have thus, at some length noticed the Bedford case as set out in 88 Fed. Rep. p. 7, in 181 U. S. p. 227, *supra* and also Allgeyer's case with the view of satisfying the thoroughly industrious and very able counsel of the appellant. It may be a vain effort to satisfy one, who seems to doubt so strongly, but so high is the regard in which we hold him, that we have undertaken the task in the hope, that a more patient and thorough examination of this case, and the others to which we have referred in this, and in the cases of Shannon and Wilson, will enable him to concur in the correctness of the conclusion at which we have arrived, on our statutes, and the facts in our cases. It is only necessary to add that the court, properly, under our statutes and practice, struck from the files the amended notices and pleas, the object of which was to inject into the case, nearly two years after the cause had been at issue, and ready for hearing, a Federal question.

It is clearly shown that the appellant, after its motion to remove the cause to the Federal court had been over-ruled July 29th
167 1899, filed the plea of general issue, with elaborate notice, on Sept. 27th 1899; that afterwards, without having first obtained leave of the court, it filed on April 20th 1901, some eighteen months after the cause was at issue, an amended notice—a wholly different notice—under its plea of the general issue; and that later, on August 6th 1901, again without having obtained leave to do so, it filed an amendment to its pleas, and an amended—so called—notice, wholly different from its first notice, some nearly two years after the cause had been at issue and ready for trial. This effort, by these amendments to the pleas and notice, *were* simply an after thought, an effort, at that late stage, to inject a Federal question into the record. Appellant also asked an instruction, and filed a series of reasons why the instruction should be granted. It was an ex-

traordinary procedure to file with a requested instruction a page or two of written reasons why it should be granted. The purpose was obvious. It was another ingenious, but unsuccessful effort to inject the Federal question into the record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have — an issue involving the Federal question, to which an instruction would have been appropriate. But the court had very properly, in accordance with our statutes and practice, refused leave to file the amended pleas and notices, and stricken them from the files, on the obvious ground that appellant had presented them entirely too late—nearly two years after the cause had been fully at issue and waiting for trial. Such delay was gross laches, and the court properly refused the leave to file them.

Affirmed on direct appeal and reversed on cross-appeal.

Endorsed: Filed April 7, 1902 E. W. Brown clerk by W. J. Brown, Jr. D. C.

168 In the Supreme Court of the State of Mississippi.

THE NATIONAL MUTUAL BUILDING & LOAN Association of New York, Appellant, vs. F. V. BRAHAN, Appellee. } At Law. Petition for Writ of Error.

And now comes The National Mutual Building & Loan Association of New York, appellant, herein, and says that on or about the 7th day of April 1902, the supreme court of the State of Mississippi, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between the National Mutual Building & Loan Association of New York and said F. V. Brahan, entered judgment herein in favor of the appellee, and against this appellant, affirming a judgment theretofore rendered in said cause by the circuit court of Lauderdale county in said State, in favor of said F. V. Brahan and against the said The National Mutual Building and Loan Association of New York, wherein was drawn in question the construction of a clause of the Constitution of the United States, to wit, section 1 of the 14th amendment thereof, among other clauses, and the decision was against the right, title, privilege and exemption specially set up and claimed under such clause of the said Constitution, in which judgment, and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this appellant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore this appellant prays that a writ of error may issue in this behalf to the supreme court of the State of Mississippi for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; and also that an order be made fixing the amount of security, which the appel-

lant shall give and furnish upon said writ of error, and that upon the giving of said security a writ of supersedeas issue to stay all further proceedings in said cause, until the determination of said writ of error by the Supreme Court of the United States.

And your petitioner will ever pray.

MARCELLUS GREEN,
J. S. SEXTON &
A. S. BOZEMAN,
Attorneys for Appellant.

169 Know all men by these presents, that we, The National Mutual Building & Loan Association of New York a corporation, as principal, and The American Surety Company of New York, a corporation, as sureties, are held and firmly bound unto Frank V. Brahan in the full and just sum of two thousand dollars, to be paid to the said Frank V. Brahan certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of October, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a supreme court of the State of Mississippi in a suit depending in said court, between The National Mutual Building & Loan Association of New York, appellant, and Frank V. Brahan, appellee a judgment was rendered against the said appellant and the said appellant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frank V. Brahan citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said The National Mutual Building & Loan Association of New York shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

{Seal of National Mutual Building & Loan Association of New York. Incorporated Apr. 23, 1888.}

NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
By CHARLES B. PEET, *President.* [SEAL.]

Attest: WILLIAM GIBSON, *Secretary.* [SEAL.]

AMERICAN SURETY COMPANY OF NEW YORK. [SEAL.]
By DAVID B. SICKELS, *Vice-President.*
R. H. TOWNER, *Attorney.*

[Seal of American Surety Company of New York.]

Sealed and delivered in presence of—
G. M. THOMPSON.
S. K. RAYMOND.

Approved to operate as a supersedeas.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

105378.
K. J. P.

170 STATE AND COUNTY OF NEW YORK, *ss:*

On this 8th day of Oct. 1902, before me personally appeared David B. Sickels. vice president of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the city of New York; that he is the vice president of the American Surety Company of New York, the corporation described in and which executed the above instrument; that he knew the corporate seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said David B. Sickels. further said that he was acquainted with R. H. Towner. and knew him to be one of the attorneys of the said corporation, that the signature of said R. H. Towner. subscribed to the said instrument, is in the genuine handwriting of the said R. H. Towner. and was thereto subscribed by the like order of the said board of directors, and in the presence of him the said David B. Sickels. vice president.

[Seal of K. J. Peircey, Notary Public, Kings County.]

K. J. PEIRCEY,
Notary Public, Kings Co., #5.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co's.

At a regular quarterly meeting of the board of trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following resolution was adopted:

"*Resolved*, That the president and vice-presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the secretary, one of the assistant secretaries, or one of the attorneys."

COUNTY OF NEW YORK, ss:

I, R. H. Towner. attorney of the American Surety Company of New York, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 8th day of Oct. 1902.

[Seal of American Surety Company of New York.]

R. H. TOWNER, *Attorney.*

170½ American Surety Company of New York.

Incorporated April 14, 1884.

General offices, 100 Broadway.

Financial Statement June 30, 1902.

Resources.

Real estate and improvements	$3,013,217.16	
Stocks and bonds	1,846,571.25	
Bills receivable	58,154.62	
Cash in banks and offices	388,892.11	
Premiums in course of collection	254,882.52	
Accrued interest and rents	23,872.08	
		$5,585,589.74

Liabilities.

Capital stock	$2,500,000.00	
Surplus	1,000,000.00	
Undivided profits	1,119,153.43	
Premium reserve requirement	653,102.29	
Claims in process of adjustment	265,620.84	
Bills and accounts payable	47,713.18	
		$5,585,589.74

STATE OF NEW YORK, } ss:
County of New York, }

R. H. Towner. being duly sworn says: That he is an attorney of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws. That said company has also duly complied with and is duly qualified to act as surety under the act of Congress of August 13, 1894, entitled "An act relative to recognizances, stipulations, bonds and undertakings and to allow

certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said company as rendered pursuant to section 4 of said act of Congress; that said American Surety Company of New York is worth more than $2,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

R. H. TOWNER.

Subscribed and sworn before me this 8th day of Oct., 1902.

[Seal of K. J. Peircey, Notary Public, Kings County.]

K. J. PEIRCEY,
Notary Public, Kings Co., # 5.

Certificate filed in New York, Queens, Richmond, Westchester, Dutchess, Putnam, Orange, Suffolk, Rockland and Nassau Co's.

170½ [Endorsed:] 10416 The National Mutual B. & L. Ass'n of N. Y. *vs.* Frank V. Brahan Bond Filed Oct. 20 1902 E. W. Brown clerk By W. J. Brown Jr. D. C.

171 STATE OF MISSISSIPPI:

I, E. W. Brown, clerk of the supreme court of Mississippi do hereby certify that this and the foregoing 170 pages contain a full, true and correct copy of the record and proceedings in the case of The National Mutual Building & Loan Association of New York *v.* Frank V. Brahan, appellee, lately pending in said supreme court and numbered 10416 on the docket of said court, together with a copy of the opinion delivered by said supreme court.

In testimony whereof witness my hand and the seal of said supreme court this 10th day of November, A. D. 1902.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk*,
By W. J. BROWN, JR., *D. C.*

172 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Mississippi, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The National Mutual Building & Loan Association of New York, appellant, and Frank V. Brahan, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of

their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a
173 clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said appellant as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of October, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 10416 The National Mutual B. & L. Ass'n of N. Y. vs. Frank V. Brahan Writ of error Filed Oct. 20 1902 E. W. Brown clerk By W. J. Brown Jr. D. C.

In obedience to the within writ of error I herewith return the same and send therewith to the Supreme Court of the United States, under my hand and seal of the supreme court of Mississippi, directly and openly the record and proceedings in the cause in said writ mentioned, with all things concerning the same.

Seal Supreme Court, State of Mississippi.

In testimony whereof, witness my signature and the seal of said supreme court of Mississippi this 10th day of November, A. D. 1902.

E. W. BROWN, *Clerk*,
By W. J. BROWN, JR., *D. C.*

174 UNITED STATES OF AMERICA, *ss:*

To Frank V. Brahan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the

clerk's office of the supreme court of the State of Mississippi, wherein The National Mutual Building & Loan Association is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 13th day of October, in the year of our Lord one thousand nine hundred and two.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] 10416 The National Mutual B. & L. Ass'n of N. Y. *vs.* Frank V. Brahan Citation Filed Oct. 20 1902 E. W. Brown clerk by W. J. Brown Jr. D. C.

On this the 22nd day of October, in the year of our Lord one thousand nine hundred and two, I have received a true copy of the within citation and accept service of same.

F. V. BRAHAN, *Defendant.*

Sworn to and subscribed the 22 day of October, A. D. 1902.

175 In the Supreme Court of Mississippi.

THE NATIONAL MUTUAL BUILDING & LOAN Association of New York *vs.* FRANK V. BRAHAN. } At Law. Assignment of Errors.

The National Mutual Building and Loan Association of New York, appellant, in connection with its petition for a writ of error makes the following assignment of errors in the final judgment rendered in said cause and the proceedings had prior thereto.

1. The said supreme court of Mississippi erred in the rendition of said final judgment in said cause in that thereby it deprived the appellant, which is a New York corporation of its liberty to contract and of its property without due process of law in violation of section 1 of the 14th amendment to the Constitution of the United States.

2. And in that by the rendition of said final judgment said supreme court deprived the appellant without due process of law and in violation of section 1 of said 14th amendment to said Constitution of the United States of its liberty to make a contract in the State of New York with its shareholder residing in Mississippi; said contract being valid under the laws of New York and performable in the State of New York.

3. And in that by the rendition of said judgment the said supreme court deprived the appellant without due process of law and in violation of section 1 of the 14th amendment to the Constitution of the United States of its liberty to advance money to its shareholder residing in Mississippi, and of its liberty to contract with its share-

holder in the State of New York to repay said money in the State of New York.

4. And in that by the rendition of said final judgment the said court deprived the appellant, a New York corporation, without due process of law and in violation of section 1 to the 14th amendment to the Constitution of the United States of its money and property advanced to one of its shareholders and due the appellant under a contract performable in New York and valid and enforceable under the laws of the State of New York.

5. And in that by the rendition of said final judgment the said supreme court denied to the appellant the equal protection of the laws in violation of section 1 of said 14th amendment to the
176 Constitution of the United States.

6. And in that by the rendition of said judgment the said supreme court deprived the appellant's shareholder without due process of law of his liberty to make a contract performable in New York to the injury of appellant and in violation of section 1 to said 14th amendment to the Constitution of the United States.

7. And in that by the rendition of said judgment the said supreme court erred in not giving full faith and credit to the public acts, records and judicial proceedings of the State of New York and particularly chapter 122 of the Laws of New York of 1851, and the acts amendatory thereof, under which appellant was incorporated and the articles of association of appellant and the decision of the supreme court of New York in the case of Association *vs.* Read, 93 N. Y. 474, and other cases upholding the validity of contracts similar to the contract herein questioned in violation of section 1 of article 4 of the Constitution of the United States.

8. And in that by the rendition of said judgment the said supreme court erred in applying to the contract herein questioned the declaration of public policy first announced by the supreme court of Mississippi in the case of Sokoloski *vs.* New South Building & Loan Association, 77 Miss. 155, and the decision following the same, which declaration of public policy made long after the making of the contract here in question was tantamount to judicial legislation, and as to this contract was in effect the passage of a law both *ex post facto* and impairing the obligation of said contract and was in violation of section 10 of article 1 of the Constitution of the United States.

9. And in that by the rendition of said judgment the said supreme court of Mississippi impaired the obligation of the contract in question in violation of said section 10 of article 1 of the Constitution of the United States.

Wherefore the said The National Mutual Building and Loan Association of New York, plaintiff in error, prays this honorable court to examine and correct the errors assigned and for a reversal of the judgment of the supreme court of Mississippi entered in said cause.

MARCELLUS GREEN,
J. S. SEXTON, &
A. S. BOZEMAN,
Attorneys for Plaintiff in Error.

177 Clerk's fee for transcript, one hundred and two 85 / 100 dollars, paid by the National Mutual Building and Loan Association of New York.

[Seal Supreme Court, State of Mississippi.]

E. W. BROWN, *Clerk*,
By W. J. BROWN, JR., *D. C.*

Endorsed on cover: File No. 18,733. Mississippi supreme court. Term No. 505. The National Mutual Building & Loan Association of New York, plaintiff in error, *vs.* Frank V. Brahan. Filed November 12th, 1902.

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JAMES H. McKENNEY
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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 158

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,

Plaintiff-in-Error,

vs.

FRANK V. BRAHAN,

Defendant-in-Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

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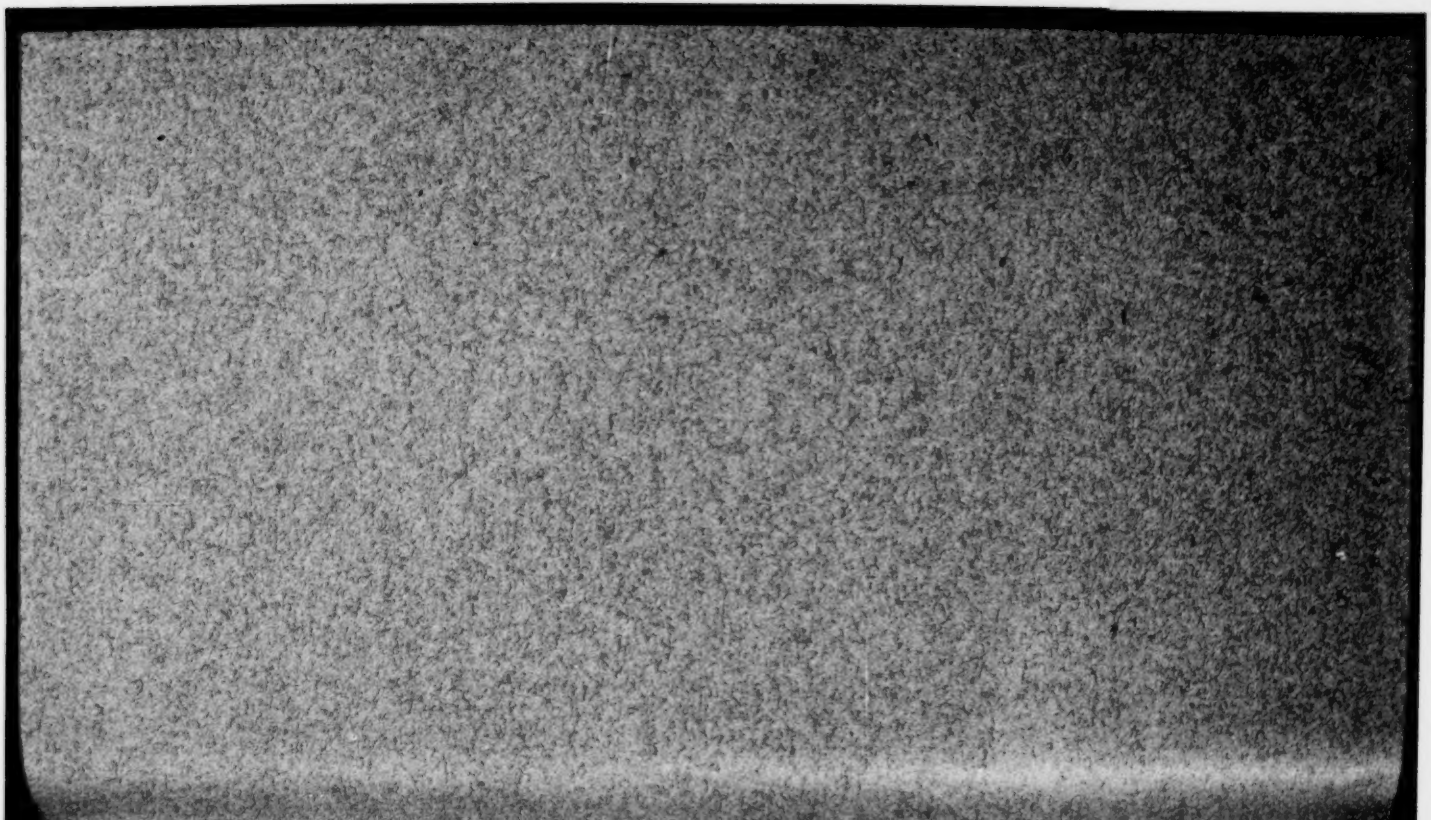

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(18,733.)

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 505.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
Plaintiff in Error,

versus

FRANK V. BRAHAN,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

Statement of Case.

This writ of error presents for review a final judgment of the Supreme Court of Mississippi, which affirmed a judgment of the Circuit Court of Lauderdale County in favor of defendant in error against plaintiff in error. Frank V. Brahan instituted an action at law in the Circuit Court of Lauderdale County, Mississippi, against the National Mutual Building and Loan Association of New York, to recover the sum of $2,223.41, which Brahan alleged he had paid to said Association in

excess of the principal of two several loans or advances made to him by said association, which loans were alleged to be usurious, under the statute of the State of Mississippi, authorizing the recovery of all interest paid on any contract requiring the payment of a greater rate of interest than ten per cent. per annum (Transcript, pp. 1–5).

The contracts in question were made by and between said Frank V. Brahan and the National Mutual Building and Loan Association of New York, under the circumstances and in the manner hereinafter stated:

Frank V. Brahan was, and is, an attorney-at-law, and a resident and citizen of Lauderdale County, Mississippi, and was over twenty-one years of age when he applied to become a member of said association (Transcript, pp. 67–68).

The National Mutual Building and Loan Association of New York is a mutual building and loan association incorporated under Chapter 123 of the Laws of the State of New York, passed April 10, 1851, entitled "An Act for the incorporation of building, mutual loan and accumulating fund associations," and the Acts amendatory thereof, to-wit: Chapter 564 of the Laws of New York, passed June 9, 1875, and Chapter 96 of the Laws of New York, passed April 1, 1878; and was organized for the purpose of carrying on the business of a building and loan association in the City and State of New York; and its domicile and principal place of business is, and always has been, in the City of New York (Transcript, p. 38).

The Association at first made loans in the State of New York only, but afterwards extended its operations and made loans to its shareholders in other States, including the State of Mississippi (Transcript, pp. 42–53).

The Association was authorized to, and did in fact, lend money to its shareholders only (Transcript, pp. 62–65).

The Association did not have any branch offices in the State of Mississippi for the purpose of lending money; and never had any such office anywhere except its principal office in the State of New York; but did have an agent in Meridian, Mississippi, who had authority to receive and forward to the office of the Association of New York applications for shares and applications for loans, and to receive and receipt for dues on shares and interest and premiums on loans; but such agent did not, at any time, have power or authority to make or grant loans for the Association (Transcript, p. 38).

Under the articles of Association, the executive committee of the Association, consisting of the first vice-president, the secretary and general attorney, alone had authority to pass upon applications for loans, and all loans that have ever been granted by the Association have been granted by such committee (Transcript, p. 38).

The plan upon which all loans are granted by the Association, including the loans to Brahan, is as follows:

Loans are made only to members of the Association.

A borrowing member is required to own and pledge one share of stock in the Association of the maturity value of $100.00 for each $100.00 borrowed. by him, and to pay the dues on each share at sixty cents per month, and to pay interest at the rate of six per cent. per annum on each $100.00 borrowed, until the shares mature, that is, until the shares are worth $100.00 each. He is also required to pay a monthly premium of fifty cents on each

$100.00 borrowed for not over eight years from the date of the loan, even though it takes longer than eight years to mature the shares; 5/6 of the amount paid for dues on shares is credited directly on those shares; and the fund so formed, with profits credited thereto, eventually works the maturity of the shares. The other 1/6 of the dues is appropriated to the expense fund of the Association.

The profits are made up of the interest and premium paid by all borrowers, the fines paid, and the difference between the withdrawal value and the holding value, or book value, of the shares when withdrawn before maturity; the withdrawal value being always less than the holding or book value. All profits, from whatever source, go into one common fund, and are apportioned quarterly to all shares in force according to their capital value. For example, a share worth $10.00 receives 1/2 as much of the profits on an appointment, as a share that is worth $20.00.

The loan fund is made up of 5/6 of the dues, as aforesaid, and all profits of the Association, and from this fund loans are made to the members on the terms aforesaid.

No payments of dues, interest, or premium, made by borrowing members are credited on the principal of the loan; but all such payments go to mature the shares; and when the shares become worth $100.00 each, their value is then applied under the contract, in re-payment of the principal sum borrowed, upon their being surrendered to the Association; the maturity value of each share, to-wit: $100.00 thus repaying $100.00 on the principal sum borrowed.

The application of the value of the shares to the re-payment of the loan is always made at the office of the Association in the City of New York.

Loans are of two kinds: 1st, Loans upon shares, and 2d, Loans upon shares and real estate.

All applications for loans must be made, and are made, upon blanks provided for that purpose.

All such applications are, and have been, considered and passed upon by the executive committee of the Association at the office of the Association in New York.

In case of a loan on shares and real estate, the indebtedness and the agreement to repay the advance is evidenced by a bond, and is secured by an assignment of the shares as collateral and a mortgage on real estate.

All papers securing loans are drawn at the office of the Association in New York, and if the borrowing member does not reside in New York, the papers are sent by the secretary of the Association to a local attorney at the place of his residence, with checks on the Mercantile Trust Company of New York for the amount of the loan, with instructions to deliver the checks to the borrower on the proper execution of the papers, and on his being able to give an unencumbered title to the property. (Transcript, pp. 51–52.)

It is provided in all the bonds and mortgages executed by borrowers that all payments are to be made to the Association at its office in the City of New York. (Transcript, p. 53.)

Brahan was permitted to make payments of dues, interest and premium to the special agent of the Association at Meridian, Mississippi, for his own convenience, but there was no requirement or contract that he should do so; the only contract in regard to the place of payment being that embodied in the Bond, assignment and mortgage. (Transcript p. 41.)

ARTICLES OF ASSOCIATION.

The Articles of Association, material to be considered in this case, are the following:

ARTICLE 1.

Name, Location, and Objects.

Section 1. The name of this corporation is the "National Mutual Building and Loan Association of New York."

Section 2. The principal office of the Association shall be in the City of New York.

Section 3. The objects for which the Association has been formed are:

The accumulation of a fund for the purchase of real estate, the erection of buildings, the establishment of homes, making improvements on lands and paying off incumbrances thereon, aiding its members in acquiring real estate, making improvements thereon and removing encumbrances therefrom, and for the further purpose of accumulating a fund to be returned to its members who do not obtain advances on their shares, when the funds of the Association, to the credit of each share, shall amount to one hundred dollars, the full value of a share. And for the transaction of the general business of a building, mutual loan and accumulating fund association."

ARTICLE 3.

Meetings, Votes.

"Section 1. The first regular meeting shall be held within thirty days after the incorporation of the association, for the election of officers of the association; and thereafter on the third Wednesday of April in each year, a general meeting of the association, for the election of directors, shall

be held in the City of New York, at such hour and place as the directors may designate."

"The secretary shall at least twenty days before the time of such meeting, cause notice thereof to be deposited in the post-office in New York City, directed to the address of each member, as the same appears on the books of the association."

"Section 4. Each member of the association not in arrears shall be entitled to one vote, and but one vote, at all general and stated meetings."

ARTICLE 6.

Executive Committee.

"There shall be a standing committee to be known as the executive committee, which shall consist of the first vice-president, the general attorney and the secretary. The executive committee shall examine all applications for loans, judge of the sufficiency of the securities offered, audit and pass upon all claims against the association, and have full charge and supervision of the business of the association between the meetings of the board of directors."

ARTICLE 8.

Shares.

"Section 1. The capital of the association, to be accumulated, shall be fifty million dollars, divided into shares of the maturity value of $100.00 each, and shall be known as instalment shares, paid-up shares and interest-bearing paid-up shares."

"Section 2. Instalment Shares.—Instalment shares shall be issued in monthly series, and shall be dated the first business day of the month, and shall be due and become payable whenever the amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares."

ARTICLE 10.

Dues.

"The monthly dues on each instalment share shall be sixty cents per month, and must be paid on or before the last business day of each month until the maturity of the shares."

ARTICLE 12.

Loans.

"Section 1. The loan fund of the association shall consist of fifty cents of the monthly dues paid in on each share, interest, premiums, fines, and forfeitures, and the profits derived therefrom, and shall be loaned to members of the association by the board of directors upon approved application for loans in the order in which they have been filed."

"Section 2. Interest at the rate of not more than six per cent. per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month until the maturity of the pledged shares, and a premium of not more than fifty cents per month will be charged on each one hundred dollars borrowed, which premium must be paid on or before the last business day of each month, for a period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for the first six months to be paid in advance."

ARTICLE 13.

Loans on Shares.

"Any member can borrow on his shares ninety per cent. of the withdrawal value thereof, upon executing and delivering to the association such

note, bond or other instrument as the board of directors may require, together with an assignment of the shares as security. Interest and premiums on such loans will be the same as in the case of a loan on real estate security, and the loan may be repaid in the same manner and on the same terms, but no redemption fee will be charged on such loans" (Transcript, pp. 27–34).

THE CONTRACTS IN QUESTION.

First Loan.

In April, 1892, the defendant-in-error, Frank V. Brahan, then a resident of Meridian, Mississippi, desiring to borrow $2,500.00 from the National Mutual Building and Loan Association of New York on certain lands owned by him in Meridian, Mississippi, and being advised that said association made loans, or advances, to its members only, made written application for membership in the association, and subscribed for twenty-five shares of stock in the association, agreeing in said application to abide by all the terms and conditions contained in the articles of Association (Transcript, pp. 19–67).

And at the same time the said Brahan made a written application to the Association at New York for a loan of $2,500.00 on his twenty-five shares in said Association, on the terms, and under the rules and regulations of the Association (Transcript, pp. 19–68).

These applications for membership and for a loan were given by Brahan to the local agent of the Association at Merdian, Mississippi, and they were forwarded by this agent to the Association in the City of New York; and, *after due consideration at New York* by the executive committee of the Association, the application was there granted by said committee (Transcript, p. 40.)

The agents at Meridian, Mississippi, had nothing to do with the granting of the loan; but their entire connection with the matter ended when they forwarded the application to the Association (Transcript, p. 40.)

Thereupon, the said twenty-five shares of stock having been issued to Brahan in pursuance of his application and subscription, and said loan having been granted, Brahan executed to the Association, on May 21, 1902, his bond, assignment of stock and mortgage on certain real estate situated in Mississippi, whereby he agreed to repay said Association the said sum of $2,500.00 at its office in New York City, with interest on the same at the rate of six per cent. per annum until paid, together with a monthly premium of $12.50 for eight years, or until the earlier maturity of said shares should they mature before the expiration of eight years, and in addition thereto the sum of $15.00 for the monthly dues on the said twenty-five shares; which interest, premium and dues were *agreed to be paid* monthly *at the office of the Association in New York* (Transcript, pp. 72–77).

Upon the execution of these papers, checks of the Association on the Mercantile Trust Company of New York for the amount of the advance, were delivered to Brahan. These checks were indorsed by Brahan, and after such indorsements, were paid by said Mercantile Trust Company *at the City of New York* (Transcript, p. 42.)

Brahan paid on account of this loan $66.25 by way of advance premium. He also paid through the agent of the Association at Meridian, Mississippi, the sum of $668.75, interest, premium and dues; and on November 7, 1893, desiring to pay the loan in full without the surrender of his stock, Brahan paid the Association direct the sum of $2,500.00

in full payment of his loan, retaining his twenty-five shares of stock as an investment (Transcript, pp. 19–78).

This payment was made by Brahan's sending to the Association at New York a draft for $2,500.00, drawn by J. C. Lloyd & Company on the Hanover Fire Insurance Company of New York; and the draft was paid to the Association at New York. by the Insurance Company, the drawee. (Transcript, p. 50.)

Brahan carried his twenty-five shares of stock in the Association from this date until October 1894, as an investment, and paid thereon during this time dues aggregating $135.00.

In October, 1894, Brahan withdrew five of these shares under the provisions of the Articles of the Association, and received therefor in cash the sum of $73.90, their withdrawal value, which was made up in part of the profits that had been apportioned thereto (Transcript, pp. 20–45)

Second Loan.

On June 6, 1894, Brahan made a second application in writing to the Association in New York for a loan of $2,000.00 on his twenty shares of stock. This application went through the same routine as the first application. It was filled out by Brahan at Meridian, Mississippi, on a printed form furnished by the Association for that purpose, and was delivered by Brahan to the agent of the Association at Meridian, and was forwarded by this agent to the Association at New York for consideration. The application was considered by the executive committee of the Association in New York City, and *was there granted* by the executive committee, and, in pursuance thereof, Brahan executed to the Association his bond, assignment of shares and mortgage of date August 30, 1894, which were in the same

form and to the same effect as the former bond, assignment of shares and mortgage executed by him on May 21, 1892 (Transcript, pp. 20–26, 70–71, 39–40).

Upon the execution of these papers, checks for the amount of the advance drawn by the Association on the Mercantile Trust Company of New York, were delivered to Brahan, and, after being indorsed by him, were paid by the Trust Company at New York (Transcript, p. 42).

This bond and mortgage provided that Brahan should repay the $2,000.00 to the Association *at its office in New York City*, and that the monthly payments of dues, interest and premium were payable *at the office of the Association in New York City* (Transcript, pp. 20–26).

Brahan paid on this second loan, and on his stock, dues, interest, premium and fines to the amount of $868.00, which was paid by him to the special agent of the association at Meridian, Mississippi, and these payments were forwarded by said agent to the Association at New York (Transcript, p. 20).

In March, 1897, Brahan desired to surrender his shares and to pay his loan in full; and he accordingly withdrew his shares before maturity under the terms of the Articles of Association, and procured their withdrawal value, $649.70, to be applied by the Association *at New York* as a part payment on the loan. This left a balance due of $1,473.96, and Brahan paid this to the Association by sending *to the Association at New York* a draft on New York for that amount, $1,473.96 in March, 1897 (Transcript, pp. 20–50).

It will thus be seen that the greater portion of both these loans, to wit: the sum of $2,500.00 on the first loan, and the sum of $1,473.96 on the second loan, were repaid by Brahan to the Association *at its office in New York* in strict compliance

with the provisions of the bonds, assignments and mortgages in this regard (Transcript, p. 56).

The payments of dues, interests and premiums, made by Brahan to the special agent of the Association at Meridian, Mississippi, were so made by Brahan for his own convenience by permission of the Association—a permission which was revocable at pleasure—and there was never any contract authorizing or requiring Brahan to make payments to an agent of the Association at Meridian; nor was there any agreement, or understanding between Brahan and the Association, that the Association should maintain an agent at Meridian, to whom payments might be made (Transcript, p. 41).

The provisions in the bonds and mortgages that all payments were to be made to the Association at its office in New York, were not inserted in these instruments for the purpose or with the intent to evade the usury laws of the State of Mississippi; but were incorporated in the forms of these instruments first used by the association when it was making loans in the State of New York only; and when the association extended its operations to other States, the same forms were used as in New York, because it was considered both prudent and expedient that all payments should be made to the association at its office in New York, and in order that its contracts should have a uniform interpretation (Transcript, pp. 41-42).

Both of the loans in question were paid and settled by Brahan *voluntarily and of his own motion*, and he was not forced to pay them, or either of them, by the association; nor did Brahan make any objection to the settlement of said loans as made, or the amounts paid the association, for more than two years after the settlement of the last loan (Transcript, p. 56).

PLEADINGS, STATUTES OF MISSISSIPPI AND FEDERAL QUESTIONS.

The declaration was filed on July 7, 1899, during the July term of the Circuit Court, and alleged that the defendant association was a foreign corporation engaged in lending money in the State of Mississippi; that the loans and contracts in question were made in Mississippi, and to be performed in Mississippi by plaintiff Brahan making all his payments to the agent of the defendant association at Meridian; and that the provision in the contract requiring payments to be made to the association at its office in New York was written therein by the defendant with the intent fraudulently to evade the usury laws of the State of Mississippi; that both of said loans were usurious contracts and wilful violations of the statute of Mississippi against usury, and that he had paid the association $2.223.41 in excess of the principal of said loans, which he was authorized to recover under the statute of Mississippi, and for this sum he demanded judgment.

In this connection we call the Court's attention to the fact the declaration was signed by "F. V. Brahan, *per se*" (Transcript, pp. 1-4).

The Mississippi statute against usury in force when the first loan was made in May, 1892, was Chapter 13 of the Acts of 1886, which is as follows:

"AN ACT IN RELATION TO THE RATE OF INTEREST IN THIS STATE."

"Section 1. Be it enacted by the Legislature of the State of Mississippi. That hereafter no person, bank, corporation or association of persons, except building or loan associations, shall demand or stipulate for a greater rate of interest than ten

per cent., per annum, for any money advanced or loaned, or any note, account, or other evidence of debt."

"Section 2. Be it further enacted, That every provision of any Act heretofore passed, creating any corporation, or amending any act creating any corporation, which authorizes any such corporation to take or receive more than ten per centum interest per annum, or which is in conflict with Section 1141, of the Code of 1880, is hereby repealed."

"Section 3. Be it further enacted, That this Act takes effect and be in force from and after its passage."

"Approved, March 13, 1886."

The statute in force when the second loan was made in August, 1894, was Section 2348 of the Annotated Code of 1892, which is as follows:

"Legal Rate. The legal rate of interest on all notes, accounts, and contracts shall be six per centum per annum; but contracts may be made, in writing, for the payment of a rate of interest as great as ten per centum per annum. And if a greater rate of interest than ten per centum shall be stipulated for or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

In September, 1899, and prior to the next term of the Circuit Court after the July term, 1899, the defendant filed its pleas to the declaration, consisting of the general issue, with notice thereunder that the defendant would give in evidence and prove, among other things, that the defendant was a Building and Loan Association, incorporated

under the laws of the State of New York and domiciled in the City of New York, where all its business was transacted, and all moneys due it were payable; that by the terms of the contract executed by plaintiff, all payments to be made on said loans, and for interest, premium and dues, were to be made in the City of New York; that under the contract and the Articles of Association, the loans were to be re-paid at the City of New York by the application at that City of a fund there accumulated, and there applied at maturity of the shares, and on surrender of same, in re-payment of the loan; that the applications for both loans were made to the defendant in the City of New York; that said applications were passed on and granted in the City of New York by the executive committee of the Association, which committee had the sole and exclusive power to grant loans; that said loans were re-paid in fact at New York, as provided in the bonds and mortgages; that the defendant Association was organized and incorporated under Chapter 122 of the laws of New York of 1851, and the Acts amendatory thereof.

Afterwards, in April, 1901, no trial of said cause having been had, the defendant below, the National Mutual Building and Loan Association, filed a motion for leave to amend its notice under the general issue. The character of the amendment will more fully appear in the brief filed herewith (Transcript, p. 14).

And afterwards, in August, 1901, the defendant, the National Mutual Building and Loan Association, filed its other motion for leave to further amend its notice under the general issue; the character of this amendment will also more fully appear in the brief filed herewith (Transcript, pp. 16–17).

At the October term, 1901, the plaintiff filed a motion to strike out these amendments, because filed without leave of the Court, and because the time for pleading had expired, and because an attempt had already been made to remove the cause to the Federal Court (Transcript, p. 18).

The Court below heard the motions of the defendant for leave to file these amendments to its notice under general issue, and also the motion of plaintiff to strike them out, at the same time, and ordered that the plaintiff's motion to strike out be sustained and denied the defendant's motion for leave to amend without assigning any reason therefor. "To which action of the Court the defendant then and there excepted" (Transcript, p. 18).

Afterward, and at the same term, the case was tried, and at the trial, the defendant Association moved the Court to instruct the jury to find for the defendant, for the reasons shown in said motion, which was as follows:

"And defendant, by its attorney, moved the Court to also give to the jury peremptory instruction for defendant, as follows:

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NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK.

The defendant moves the Court to instruct the jury to find for the defendant as per the instruction herewith shown the Court:

1. Because the evidence shows each of the contracts in question to be a contract between a building and loan association and a borrowing shareholder, who was entitled under his contract to share and did share in the profits of the associ

ation, and the contract is therefore valid and not usurious.

2. Because the evidence shows that each of the contracts was made and consummated in the State of New York and is performable in the State of New York, and is to be construed by the laws of the State of New York, and that under the laws of New York each contract is valid and not usurious.

3. Because the evidence shows that at the time of making each of said contracts the plaintiff, F. V. Brahan, was a resident and citizen of the State of Mississippi, and the defendant association was then a resident and citizen of the State of New York, and under the fourteenth amendment to the Constitution of the United States, the plaintiff had the right, as a citizen and resident of Mississippi, to become a member and shareholder in defendant association, and to procure a loan or advance upon his shares upon the terms and conditions of the articles of association, and particularly to make said contracts payable and performable in the State of New York; and the defendant association had the reciprocal right and was under obligation to make such loan or advances to the plaintiff upon the terms aforesaid, and had the right to have said contracts made payable and performable in the State of New York, and having done this, the defendant is entitled under said fourteenth amendment to have said contracts construed and their validity determined by the laws of said State of New York, where each of said contracts is performable; and under Section 1 of article 4 of the Constitution of the United States, the defendant is entitled to have this Court give full faith and credit, in determining the validity of said contracts, to the public acts, records and judicial proceedings of the State of New York, and particularly, Chapter

122 of the laws of said State passed April 10, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations," and the several acts amending the same, to wit: Chapter 564 of the Laws of New York of 1875, and Chapter 96 of the Laws of New York of 1878; and the articles of association of the defendant, and the judicial decision in the case of Association vs. Read, 93 New York, 474, and the other decisions of said State of like tenor and effect, which hold that contracts, like the contracts in question, are valid and enforceable and not usurious under the laws of New York

4. Because said contracts are valid and not usurious under Chapter 13 of the Laws of Mississippi of 1886.

5. Because Section 2348 of the Annotated Code of Mississippi, sought to be applied in this case, in so far as each of said contracts is concerned, is a law both *ex post facto* and impairing the obligation of said contract, and in violation of Section 10 of Article 1 of the Constitution of the United States.

6 Because the decision of the Supreme Court of Mississippi in the case of Sokoloski vs. New South Building and Loan Association, 77 Mississippi, 155, and the decisions following that decision, all rendered long after the making of both of said contracts, in-so-far as they undertake to set up and define the public policy of the State of Mississippi in regard to foreign building and loan associations, and their contracts with their members, are tantamount to judicial legislation, and in violation of Section 10, Article 1 of the Constitution of the United States, in so far as both said contracts are concerned, being in effect the passage of a law both *ex post facto* and impairing the obligation of said contracts.

7. Because the evidence shows that both loans have been voluntarily repaid and settled by plaintiff with a full knowledge of all facts.

8. As to said last loan of August, 1894, because the evidence shows that prior to November 1, 1892, the plaintiff being then and there a citizen and resident of the State of Mississippi, became a shareholder in and member of defendant association, a corporation chartered under the laws of New York and domiciled in New York, whereby under the articles of association of the defendant, the said plaintiff became then and there entitled to demand and receive of defendant an advance or loan upon his said shares upon the terms and conditions set out in said articles of association, when he should request the same, and the defendant then and there before said November 1, 1892, became and was under obligation to make said loan or advance to plaintiff when demanded upon the terms and conditions as aforesaid; that the said loan of August 30, 1894, was made by defendant to plaintiff on the shares aforesaid in pursuance of said contract of membership made and entered into prior to November 1, 1892, and in pursuance of said contract of membership and said articles of association, said contract of plaintiff to re-pay said loan was made payable and performable in said State of New York; wherefore, Section 2348 of the Annotated Code of Mississippi does not govern said contract, and is as to said contract a law both *ex post facto* and impairing the obligation of said contract and in violation of Section 10, Article 1 of the Constitution of the United States; and under Section 1 Article 4 of said Constitution and the laws of New York and the fourteenth amendment to said Constitution, the said contract of August

30, 1894, is valid and enforceable and not usurious

9. For other reasons apparent to the Court.

COCHRAN & BOZEMAN,
Defendant's Attorneys.

(Transcript pp. 94–96).

The Court refused the instruction, which was exhibited with the foregoing motion, and was presented to the Court in the following words:

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"1. The Court instructs the jury to find for the defendant" (Transcript, p. 96).

To which action of the Court, the defendant then and there excepted.

The Court instructed the jury "to find for the plaintiff in the sum of the excess of $2,000 paid the defendant by the plaintiff on the loan of $2,000 made in June 1894, together with interest at six per cent. per annum from July 7, 1899, to date" (Transcript, p. 93).

There was a verdict in favor of plaintiff in the court below, which was followed by a judgment, and thereupon, the defendant moved the Court to set aside the verdict of the jury and the judgment rendered thereon:

"1. Because the Court erred in refusing the peremptory instruction asked by the defendant.

2. Because the Court erred in denying the defendant's motion for a peremptory instruction."

And for other causes assigned (Transcript, pp. 96–97).

The Court overruled and denied said motion, and thereupon, the judgment of the lower court against the defendant became final.

The plaintiff in the court below also moved to set aside the verdict of the jury and to grant a new trial, and this motion was likewise overruled; whereupon, an appeal and cross appeal were prosecuted to the Supreme Court of the State of Mississippi, where the appellant, in that court and also in this, filed an assignment of errors, including among others the following:

"1. The court below erred in overruling the motion of appellant (defendant below) for leave to amend its notice under the general issue, and in striking out the amendment filed by defendant below, of date April 20th and August 6th, 1901.

2. The court below erred in overruling appellant's motion for a peremptory instruction.

3. The court below erred in refusing the peremptory instruction asked by appellant" (Transcript, p. 103).

The Supreme Court of Mississippi affirmed the judgment below on direct appeal, and reversed same on cross appeal; this action of the Court in both respects being adverse to the contention of appellant on the Federal questions involved and urged by it, and from this decision an appeal has been prosecuted in this cause.

The judgment of the Supreme Court of the State of Mississippi appears on pages 103 and 104 of the Transcript, and the opinion of the Supreme Court, rendered by WHITFIELD, C. J., appears on pages 104 to 116 of the Transcript.

Mississippi Courts take judicial notice of the Statutes of other States.

Under the statutes of the State of Mississippi, the Courts of that State take judicial cognizance of the laws of other States, as they do of the laws of Mississippi, and for this reason the statute of Mississippi and of New York relied upon were not given in evidence, and do not appear in the Transcript.

Section 939 of the Annotated Code of Mississippi, in force since November 1, 1892, provides as follows:

"(2296) COURTS TO TAKE NOTICE OF LAW OF OTHER STATES.—When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

Assignments of Error by the National Mutual Building and Loan Association, of New York, Defendant and Appellant.

IN THE SUPREME COURT OF MISSISSIPPI.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK

vs.

FRANK V. BRAHAN.

"The National Mutual Building and Loan Association of New York, appellant in connection with its petition for writ of error makes the following assignment of errors in the final judgment rendered in said cause and the proceedings had prior thereto.

1. The said Supreme Court of Mississippi erred in the rendition of said final judgment in said cause in that thereby it deprived the appellant, which is a New York corporation, of its liberty to contract and of its property without due process of law in violation of Section 1 of the 14th amendment of the Constitution of the United States.

2. And in that by the rendition of said final judgment said Supreme Court deprived the appellant without due process of law and in violation of Section 1 of said 14th amendment to said Constitution of the United States, of its liberty to make a contract in the State of New York, with its shareholder residing in Mississippi; said contract being valid under the laws of New York and performable in the State of New York.

3. And in that, by the rendition of said judgment, the said Supreme Court deprived the appellant, without due process of law and in violation of Section 1 of the 14th amendment to the Constitution of the United States, of its liberty to advance money to its shareholder residing in Mississippi, and of its liberty to contract with its shareholder in the state of New York, to repay said money in the State of New York.

4. And in that, by the rendition of said final judgment the said Court deprived the appellant, a New York corporation, without due process of law and in violation of Section 1 to the 14th amendment to the Constitution of the United States, of its money and property advanced to one of its shareholders and due the appellant under a contract performable in New York and valid and enforceable under the laws of the State of New York.

5. And in that by the rendition of said final judgment the said Supreme Court denied to the appellant the equal protection of the laws in violation of section 1 of said 14th amendment to the Constitution of the United States.

6. And in that by the rendition of said judgment the said Supreme Court deprived the appellant's shareholder without due process of law of his liberty to make a contract performable in New York to the injury of appellant and in violation of section 1 to the said 14th amendment of the Constitution of the United States.

7. And in that by the rendition of said judgment of the said Supreme Court erred in not giving full faith and credit to the public acts, records and judicial proceedings of the State of New York and particularly chapter 122 of the Laws of New York of 1851, and the acts amendatory

thereof, under which appellant was incorporated and the articles of association of appellant and the decision of the Supreme Court of New York in the case of Association v. Read, 93 N. Y., 474, and the other cases upholding the validity of contracts similar to the contract herein questioned in violation of section 1 of article 4 of the Constitution of the United States.

8. And in that by the rendition of said judgment the said Supreme Court erred in applying to the contract herein questioned the declaration of public policy first announced by the Supreme Court of Mississippi in the case of Sokoloski vs. New South Building and Loan Association, 77 Miss., 155, and the decision following the same. which declaration of public policy made long after the making of the contract here in question was tantamount to judicial legislation, and as to this contract was in effect the passage of a law both *ex post facto* and impairing the obligation of said contract and was in violation of section 10 of article 1 of the Constitution of the United States.

9. And in that by the rendition of said judgment the said Supreme Court of Mississippi impaired the obligation of the contract in question in violation of said section 10 of article 1 of the Constitution of the United States.

Wherefore the said National Mutual Building and Loan Association of New York, plaintiff in error, prays this honorable Court to examine and correct the errors assigned and for a reversal of the judgment of the Supreme Court of Mississippi entered in said cause.

MARCELLUS GREEN,
J. S. SEXTON &
A. S. BOZEMAN,
Attys. for Plaintiff-in-Error."

14754

BRIEF.

The General Nature of Building and Loan Associations and the Relations Existing Between the Parties Hereto.

Before entering into an argument of the questions involved in this case, it may be helpful to the Court to briefly review the general nature of building and loan associations, and of the relations existing between the parties to this controversy.

In his introduction of the subject of "Building Associations," Endlich, in the first paragraph of his work, says:

"The building association is an institution in modern society. Its plan was designed to meet the wants and accommodate itself to the peculiarities of men, whose little earnings can be only slowly raised to an effective bulk. As a corporation, it is the creature of legislative policy, and not of legislative caprice. In its essential plan and nature it is the same all over the world, springing from the same considerations, ministering to the same necessities, achieving the same results. The similarity existing between the statutes and usages relating to building associations in the various States and countries is neither accident nor simply immitation. It is at once the evidence and the recoguition of identical requirements of society in the various communities."

In the sixteenth paragraph of his work, this author defines a building and loan association as follows:

"A building association, then, is a private corporation for gain, erected for such time, limited or unlimited, as may be permitted by the laws

under which it is incorporated, for the accumulation, from fixed periodical contributions of its shareholders in payment of the stock subscribed by them, the penalties for their non-payment and the profits upon their investment, of a fund to be applied, from time to time, in accommodating such shareholders with loans or advancements, primarily for the purpose of acquiring the free possession of real estate, or constructing dwellings, or both, under terms and regulations prescribed by legislation, or reasonably and lawfully ordained by charter and by-laws of the association, upon principles of strict mutuality and equality of benefits and obligations, with the effect of extinguishing the liability incurred for such loans and advancements, simultaneously with the termination of the shareholder's periodical contributions upon the stock held by him in the association; the object of the latter being completed when the fund raised is sufficient to distribute to each member the par value of all shares subscribed by him and held without loans, and to extinguish all loans held by shareholders."

Thompson, on "Building and Loan Associations," defines the building and loan association as follows:

"The building association, as now existing, is a private corporation, designed for the accumulation by the members of their money, by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest, and a preference in securing loans over other members, and continuing their fixed periodical instalments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed instalments, forfeitures for such continued failure of such

payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues go into the common fund, until such time as that the instalment payments and profits aggregate the face value of all the shares in the association when the assets after the payment of the expenses and losses, are pro-rated among all the members, which, in legal effect, cancels the borrower's debt, and gives the non-borrower the amount of his stock. A building society is not a benevolent institution; nor is a corporation organized for the purpose of dealing in real estate or carrying on any kind of real estate business in which natural persons may engage, a building association."

Thornton and Blackledge on "Building and Loan Associations," defines a building and loan association in the following words:

"A building association may be defined as a society (generally incorporated) organized for the purpose of creating a fund derived from periodical payments by persons upon stock subscribed for by them, as well as from fines, forfeiture and incidental fees; and if the shareholder be also a borrower, by the payment of premiums and interest; which fund is to be loaned to its members secured by mortgage upon real estate to enable them to secure homes; such payments to continue until the sum of payments and profits on each share equal its face value (after deducting necessary expenses incident to the management of the society's business), at which point of time all the shares of such members as are matured, are canceled or extinguished."

In Section 4, under the heading "Favorably Received by Courts," will be found the following:

"Societies, known as building, loan fund, and savings associations, are now recognized as im-

portant factors in the social and economic development of this country. The controlling idea is the massing of the separate earnings of wage-workers, and the savings of persons of small means, in such a manner as to aid them in procuring homes. It is the organization of thrift and self-help; a practical application of the maxim that in 'union there is strength.' The effect of such a movement is to dignify the home; to foster morality, and to make thoughtful, wise, and responsible citizens. It is for such reasons that the law and the courts, where such associations have been properly conducted, have looked upon them with favor."

Under the heading of "General Scope and Methods of Associations," in Section 5, we find the following:

"The conditions which make building, loan, and savings associations or societies desirable are necessarily the same everywhere. It is one of the ordinary manifestations of the development of an industrial people. The methods, the objects, and the remedial measures required are in the main the same.

The method followed by the earliest English societies has been described by an English author as contemplating the purchase of a plot or plots of land with or without some tenements upon it; and after it had been built on at the society's expense the said tenements were all allotted and mortgaged to the society in some instances, or let to members or others at a fair rental, and this mode of operation carried on until every member was in possession of a freehold estate, or had received the amount of his share in full.' This plan, however, had not sufficient flexibility to adapt itself to the needs of the members, so that the attribute of a loan company became one of the

necessary conditions of their successful operation.

As associations are now ordinarily conducted, there must be the payment of stipulated dues; there would naturally be a time fixed when a share would probably mature and when the payments made upon stock would be supposed to equal the face value of the same; when a loan fund had accumulated, the question naturally arises as to the manner in which allotments shall be made to those desiring to borrow, results in the payment of a premium by, and an award, to the highest bidder; that, although membership implies the prompt payment of instalments when due, yet that many would probably fail to pay, and that such sums would therefore, be withheld from the earning fund of the association and its profits decreased; that, therefore, such persons should pay a fine, presumed to be equal to the earning capacity of the amounts so withheld; that if from any cause a member might desire to withdraw from the association, after having entered into an agreement to pay upon his stock to maturity, he should be permitted to do so only upon such terms as would work no detriment to the remaining members."

An examination of the authorities on the subject will disclose the fact that the law with reference to building and loan associations differs in many respects from the general law of corporations.

In Endlich on "Building and Loan Associations" (2nd Edition), Section 461, it is said:

"The peculiar relation of the stock in building associations to the purposes and existence of the corporation has already been indicated. The aim of the corporation, from a purely financial point of view, is so to employ the payments made to it from time to time upon the shares of stock held by its members in the way of interest, fines or

premiums, in short all its revenues from whatsoever source, as to bring the value of its capital stock as speedily as possible up to a certain predetermined figure per share; or what amounts to the same thing, to accumulate a fund sufficient to liquidate every advanced share at its fixed par value, and at the same time to cancel every advanced share as a complete set-off against, and simultaneous with the extinguishment of, the obligation given for the advance."

In the same work it is said (see Section 12):

"The capital or stock, that is to say, the fund which the association expects to have accumulated within the period fixed for its duration, and the readiness of which to be divided in cash or by cancellation of obligations marks that period, is divided into shares, to which is given a fixed par or paid-up value. * * * The actual value of the share, which is quite a different thing, may be very small indeed, during the first years of the society's life. But the par or paid-up value is fixed from the beginning. When the two coincide the course is run, for, whilst in manufacturing and other business corporations, the capital stock is merely the instrument through which their objects are effected, and its payment, at least to a large proportion, a pre-requisite to their operations, building associations have accomplished the purposes of their organization the moment the stock, by virtue of the periodical payments made by its members, and the gains realized therefrom and placed to the credit of the association, each member having an interest therein, proportionate to the number of shares held and paid on by him—is paid up to the amount ascertained and limited by the charter of the association. The fixed periodical payments to be made on each share of stock are the 'stock payments,' 'instalments,' 'subscriptions' or 'dues.' "

In the same work it is said (see Section 329):

"The peculiar principles of the building association scheme are fully developed in the transaction of loan or advancement between the association and its members. It is a matter of no slight difficulty, to convey an exact appreciation of the elements which may enter into this transaction in their relation to one another, and so to penetrate and analyze its complicated nature, as to present, at once, all its divers phases in a homogenous and consistent aspect. *It is necessary, in order to accomplish this purpose, to exclude, from the outset, the consideration of all contracts which do not partake of the distinctive properties of the building association loan, in its legitimate character, keeping in view its legitimate results.* This transaction is made up as follows: (1) A member holding a certain interest in the ultimate achievements of the association, conditioned upon its fulfillment of the duties of its members, may, instead of waiting for the realization of its prospects upon final settlement, anticipate their contemplated result by obtaining from the society an advance bearing a certain proportion of the same. (2) In consideration of the preference thus accorded him over his fellows, the requirements of strict mutuality constrain him to yield to the society a return, in the shape of a sum of money, premium, or bonus, which he agrees to pay it, not only commensurate with the advantage he has from the accommodation, but also being a contribution to the common treasury of the association, designed to be, in a measure, an indemnification to others who have been postponed to him in the competition for such preference, in which his peculiar circumstances and necessities have justified him in overbidding them. (3) He accepts a liability to reimburse the association for the outlay it has made in

his favor, for the measure of which reimbursement the business affairs of men furnish only a single universally just and adequate basis, that of principal and interest. * * *"

"Section 125. The building association, in its turn, assumes certain corresponding obligations toward the borrower. * * * (2) It agrees to let him have the use of the money advanced during the continuance of the society's legal right, or the running of a series, provided he lives up to the terms of his undertaking."

Federal Question Properly Presented in Due Time.

The record in this case shows that the federal questions were properly raised in due time, and that they were decided adversely to the defendant in the Court below.

Section 686 of the Annotated Code of Mississippi is as follows:

> "(1550). Notice of Special Matter under General Issue.—If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give writen notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and, when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause, file a written notice to the defendant of any special matter which

he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible on the trial."

Under this provision of the Code, the defendant, in the Court below, first filed a plea of the general issue and gave notice thereunder, that the defendant association was a New York corporation, domiciled in the City of New York, where all of its business was transacted; that it had no branch office in the State of Mississippi. Thereupon, the defendant, in the Court below (plaintiff in error here), set out at some length the articles of association under which it was incorporated, and the history, nature and character of the contract existing between the parties, as well as the details of the final settlement made between the parties hereto (Transcript, pp. 7-14).

The general issue and the first notice thereunder was filed on the 27th day of September, 1899 (Transcript, p. 14).

On the 6th of August, 1901, the defendant association, by Cochran & Bozeman, its attorneys, filed a motion in the Circuit Court of Lauderdale County to amend its notice under the general issue as follows.

"IN THE CIRCUIT COURT,
APRIL TERM, 1901.

F. V. BRAHAN
vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION.

And the defendant moves the Court for leave to amend its notice under the general issue by adding thereto the amendment herewith shown to the Court, and in this connection the defendant shows to the Court that the said proposed amendment will not in any way delay the final hearing of said cause, but that said amendment is necessary in order that the merits of the controversy may be fairly brought to trial.

COCHRAN & BOZEMAN,
Defendant's Attorneys."

The amendment sought to be filed in connection with this motion was as follows:

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vs.
NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION.

AMENDMENT TO THE NOTICE UNDER THE GENERAL ISSUE.

And the defendant by leave of the Court first obtained, amending its notice under the general is-

sue, will further show and prove that each of the contracts in question is good and valid, and not usurious under the laws, public acts, records and judicial proceedings of the State of New York, where each of said contracts was made and is enforceable, and by which acts, records and judicial proceedings the validity of said contracts is to be construed and determined; that under Section 1, Article IV of the Constitution of the United States, the defendant is entitled to have full faith and credit given by the Courts of this State to said public acts, records and judicial proceedings of the State of New York; wherefore defendant sets up and relies upon said Section 1 of Article IV of the Constitution of the United States, under and by virtue of which it is the duty of this Court to uphold the validity of said contracts as being enforceable and not usurious.

And the defendant further relies upon Section 10 of Article I of the Constitution of the United States in which it is provided that 'No State shall pass any law impairing the obligation of contracts * * * *' and Section 1 of Article XIV of the amendments of the Constitution of the United States in which it is provided '* * * nor shall any State deprive any person of * * * property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' and says that it is entitled to have this Court give full force and effect to said provisions of the Constitution of the United States in construing said contracts and determining this case, and that under said provisions of the Constitution the said contracts are valid and enforceable and not usurious.

COCHRAN & BOZEMAN,
Attorneys for Defendant."

(Transcript pp. 14-15.)

This motion to amend the notice under the general issue was filed on April 20, 1901, and on August 6, 1901, the defendant, while the foregoing motion was still pending and undisposed of, through its attorneys sought further to amend said notice under the general issue by setting out the facts that at the time that the stock of said association was issued to Brahan, and also at the time the loan in question was made to him, he was a resident and citizen of the State of Mississippi, and the defendant association was a resident and citizen of the State of New York, and that under the Constitution of the United States, and particularly under the Fourteenth Amendment, said Brahan, as a citizen and resident of the State of Mississippi, had a right to become a member of the defendant association and to procure the loans in controversy upon his shares of stock in said association on the terms and conditions set out in the contract between the parties; and particularly to make said contract payable and performable in the State of New York, and that the defendant association had the right to make the said loans to plaintiff, payable in New York, and to have said contracts, which were New York contracts, construed and determined by the laws of the State where they were performed.

That the defendant relied upon Section 10 of Article I of the Constitution of the United States providing that "no State shall pass any *ex post facto* law, or law impairing the obligations of any contracts," and at the time the loans in controversy were made, there had been no legislation in the State of Mississippi, nor any decisions by the Supreme Court of said State defining the public policy of the State with reference to such contracts as existed between the parties. And the defendant insisted that the decision of the Su-

preme Court of the State of Mississippi, in the case of Sokoloski vs. The New South Building & Loan Association, in so far as it undertook to set up and define the public policy of the State in regard to contracts of foreign building and loan associations making loans in Mississippi, which was rendered long subsequent to the date of the contract in question, and all cases following this decision, was contrary to the provisions of Article I, Section 10 of the Constitution of the United States.

Defendant further sought to amend its notice to show that to apply the principles announced in the Sokoloski case, and those following it, to the contract between the parties in controversy, would be to violate the provisions of Section 1 of Article IV of the Constitution of the United States and "to deny full faith and credit to the decisions, public acts, records and judicial proceedings of the State of New York. (Transcript, pp. 16-17.)

There was filed with this proposed amended notice, an affidavit, made by one of the attorneys for the defendant, to the effect "That said proposed amendment is necessary in order to bring the merits of the controversy between the parties fairly to trial. That the final trial of said cause will in no way be delayed by the filing of said amendments, and said amendments are not asked to be filed for the purposes of delay, but that the merits of said cause shall be fairly brought to trial." (Transcript, p. 15.)

This proposed amendment to the notice under the general issue was filed August 6, 1901.

On October 10, 1901, plaintiff, in the court below, made a motion to strike out the amendments to the notice under the general issue, which motion was as follows:

"The State of Mississippi,
Lauderdale County.

In the Circuit Court Term, 1901.

F. V. BRAHAN
Plaintiff,

vs.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION, OF NEW YORK,
Defendant.

Plaintiff, by attorneys. moves the Court to strike out the amendments to notice under the general issue, filed with the clerk of this court on April 20, 1901, and the motion and amendment to pleas of defendant, filed with the clerk of this court on August 6, 1901, leave of the Court not having been first obtained in either filing;

And because; issue had previously been taken by the pleadings in the cause, and time for pleading has long since expired.

2nd. Because, the defendant made an attempt to remove the cause to the Federal Court at an earlier term of this court, which application was made after the first, or return term of this court, and the application was denied.

3rd. Because, the principal amount now involved, as is shown by the agreed statement of facts in this case is under $2,000.00.

And because, lastly, the said motion and amendments to the pleadings sought to be

filed are not available to defendant, under the constitution, laws and decisions of the Supreme Court of this State.

FEWELL & SON,
Attorneys for Motion."

Filed: October 10th, 1901.
W. D. Cameron,
Clerk."

In this connection, we desire to call the attention of the Court to the fact that this motion was filed on October 10th, 1901, whereas, the first notice to amend was filed on April 20th, 1901. The Court refused the motion made by the defendant in the court below to file the amended notices hereinbefore referred to, and sustained the motion to strike out said amended notices, and entered the following order thereon:

F. V. BRAHAN

vs.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK.

5324.

This cause coming on to be heard on the motions of the defendant to allow it to file certain amendments to the pleas of defendant, heretofore filed, and also the motion of plaintiff to strike out the amendment to notice under the general issue filed with the clerk of this court on April 20, 1901, and the motion and amendments to pleas of defendant filed with the clerk of this court on August 6, 1901,—all being filed without leave of the Court—and the Court having heard and considered both of said motions:

It is considered by the Court that the defendant's motion be and the same is hereby overruled and denied, and that plaintiff's said motion be and the same is hereby sustained, and that defendant's said amendments of date April 20th, and August 6th, 1901, be stricken from the file of said cause. To which action of the Court defendant then and there excepted.

Filed October 16th, 1901.

W. D. Cameron, Clerk,
by I. L. McElroy."

No opinion was filed by the Judge of the Circuit Court on the motion to file the amended notices under the general issue, and to strike out the same, and no reason is assigned for striking out the amended notices, raising the serious constitutional question sought to be raised thereby.

We respectfully submit that, in view of the provisions of Section 717 of the Annotated Code of Mississippi, 1892, there was no room for the plaintiff in the Court below, to complain that these amended notices were filed too late. That section provides for the allowance of amendments, and is as follows:

"Amendments allowed: The Court shall have full power to allow all amendments to be made *in any pleading or proceeding at any time before verdict so as to bring the merits of the controversy between the parties fairly to trial*, and may allow all errors and mistakes in the name of any party, or in the form of the action to be corrected; and the Court shall require all such amendments to be made on such terms, as to costs and delay, as may be proper to prevent surprise or undue advantage. Either party may except to the decision of the Court allowing or refusing amendments, and the same may be assigned for error."

It is probably safe to say that in no state in the Union is the practice of its Courts more liberal in the allowance of amendments in order, as stated by the statute, "to bring the merits of the controversy between the parties fairly to trial," than it is in the State of Mississippi. In the case of Miller vs. Northern Bank, 34 Mississippi, 412, it was held that "*Four years after the commencement of the suit will not be too late for the plaintiff to apply for leave to amend* his declaration so as to make it correspond with the proof contained in a deposition if the application be made at the first term after taking the deposition, and if it do not appear that the plaintiff knew the facts before the deposition was taken." In the case of Allen vs. Standifer, 57 Mississippi, 612, the Court held that "After two terms on issue joined upon the affidavit for writ of seizure (under Act 1876) if both parties be ready for trial the plaintiff may even then tender a statement of this claim as required." In the case of Weathersby vs. Sinclair, 43 Mississippi, 189, the Court held that "A plaintiff who has commenced a personal action may, after plea, change his action and substitute for his declaration in *assumpsit* a petition *in rem* to enforce a mechanic's lien."

In Brame & Alexander's Mississippi Digest, on page 16, Section 2, under the head of "Construction of Statute," the rule in Mississippi in reference to the statute in question is stated as follows:

"The statute requires amendments to be liberally allowed. *It allows almost anything that the controversy may be brought to trial on its intrinsic merits.* Rodgers v. Kline, 56 M., 808; Stewart v. Hollins, 47 M., 711; Hodges v. Darden, 51 M., 200; Brown v. Ashford, 56 M., 677."

In the first case cited above, Rodgers v. Kline, the defendants sought to amend their pleas, just as the defendant, in this cause, sought to amend its

notice under the general issue, which is but another method of pleading under the statutes of Mississippi hereinbefore cited and quoted. But in that case, the amendment was sought to be made *"at the close of the evidence and after the charges had been passed on by the Court."* Whereas, in the instant case, the first notice and motion to amend was offered to be filed six months before the motion to strike out was made, and the second notice to amend was offered to be filed two months before the motion to strike out was made.

In the case of Rodgers v. Kline, the Supreme Court of the State of Mississippi held that the action of the lower Court, in refusing the amendment of the pleas offered as above indicated, was erroneous. The Court said in reference thereto, "The Court had the power to allow the amendment at any time before a verdict * * *. There was no pretext that it would operate as a surprise to the adverse party, as the investigation had proceeded just as if the amendments had been previously made. Amendments should be liberally allowed, in the furtherance of justice, and in this instance we can perceive no good reason for refusing the application of the defendants."

Section 542 of the Annotated Code of Mississippi provides for amendments of pleadings and proceedings in the Chancery Courts of that State, and is as follows:

"Amendments Liberally Allowed.—Amendments shall be allowed in the pleadings and proceedings, on liberal terms, to prevent delay and injustice."

Under this statute the Supreme Court of the State of Mississippi held, in the case of Hanserd v. Grey, 46 Miss., 75, that "Amendments may be allowed after a reversal of the case in the Supreme Court if the applicants have not been guilty of negligence."

In the case of Jeffries v. Jeffries, 66 Miss., 216, it was held that, "Even if the case be set for final hearing, it is error to refuse an application to amend the bill so as to cure a variance between its allegations and the evidence where the complainant had not been guilty of negligence in not asking to amend before that time."

The last expression of the Supreme Court of Mississippi, so far as we are advised, which would throw any light on this subject, is found in the case of Hart v. Potter, 80 Miss., 797, reported in 1902.

In that case, as shown by the reporter's statement of the same "The object of the suit was to cancel clouds upon the title to land. *After the case had been submitted to the Court below for final hearing on the merits,* complainant asked leave to file an amended bill, which was presented to the Court, the nature of which is apparent from the opinion of the Supreme Court. The application to amend was denied by the Court below and a final decree was rendered for defendants, and the complainant appealed to the Supreme Court."

Terral, J., delivering the opinion of the Court, used the following language:

"An application to amend a bill of complaint after the cause had been submitted for consideration, and decision comes so late in the proceedings that the granting of it is largely within the discretion of the chancellor, and where the evidence of the fact sought to be inserted in the bill might be manufactured for the occasion, it is usually denied. But where, as here, the evidence of a fact in the chain of complainant's title is a part of the public records of the country, which may not be altered or affected by any ingenuity of pleading or false swearing of a witness, * * * we think a sound discretion would have justified the amendment.

Wherefore the decree dismissing complainant's bill is reversed, and the case is remanded to the docket of the Chancery Court with leave to complainant to amend his bill within thirty days from the time the mandate is filed therein."

In this connection we call the Court's special attention to the fact that the amendments proposed in the Court below *raised no question of fact,* and really there are no disputed questions of fact to be found in this case anywhere, but all the questions involved are *questions of law;* and it certainly does seem that when grave constitutional questions are presented to a Court *four months before the trial* of a case in one instance, and *two months before trial* in the other, such questions should be entitled to sufficient consideration to keep them from being stricken from the record without even assigning a reason therefor upon such a motion as was filed in this case, in response to which such action was taken.

When we come to examine the motion, hereinbefore set out at length, we find it almost impossible to understand how it could seriously have been presented to, much less sustained by, any Court with any sort of regard for constitutional rights.

In view of the authorities hereinbefore quoted, it is impossible to believe that the Court could have concluded that there was any merit in the first ground upon which the motion was placed, viz., that the "time for pleading has long since expired."

Turning to the second ground of the motion we find, as one of the causes assigned for striking out the amended pleadings, that "the defendant made an attempt to remove the case to the Federal Court at an earlier term of this Court * * * and the application was denied."

Who ever before heard that a constitutional question could not be raised in a case because some pre-

vious motion, made by the party seeking to raise the same, had been denied in the same case? Who ever supposed that the right to assert a constitutional question involved in a case was dependent upon the right of the party seeking to raise the same to remove that particular cause to the Federal Courts?

Again, the third ground alleged as a reason for striking out the pleadings which were stricken out in this case is that "The principal amount now involved * * * in the case is under $2,000.00." The natural corollary of this proposition is that in cases involving less than $2,000.00, the constitution does not apply.

"Lastly," it is stated in the motion that "the said motion and amendments to the pleadings sought to be filed are not available to defendant under the constitution, laws and decisions of the Supreme Court of this State." The necessary corollary of this proposition is that where there is a conflict between the Constitution of the United States and the Constitution, laws and decisions of the Supreme Court of Mississippi, the latter must prevail, which, to say the least of it, is a new legal proposition.

As will hereinafter appear, the Federal Courts of Mississippi and the Supreme Court of that State have adopted altogether different views in reference to contracts like the one in question here, and the all controlling idea underlying the action of plaintiff in the Court below seems to have been to steer clear of Federal Courts and Federal questions, and that idea alone seems to furnish an explanation of the action of the lower Court in passing upon the motion just reviewed.

Constitutional Rights Cannot Be Stricken Down by Arbitrarily Striking Out Pleadings Seeking to Present Such Questions.

If we were without authorities upon the subject, we would affirm with confidence that constitutional rights could not be disposed of by the arbitrary ruling of any Court in striking out any pleading by which such constitutional right was sought to be presented, but fortunately we find this proposition sustained in the opinion delivered by Justice Harlan in the case of Kipley v. State of Illinois, *ex rel.*, Akin, 170, U. S., 182.

In this case the Attorney General of Illinois filed an original petition in the Supreme Court of that State against Joseph Kipley, superintendent of police of the City of Chicago, for the purpose of having an act of the legislature of the State of Illinois, entitled "An Act to regulate the civil service of cities," interpreted and for relief thereunder.

Kipley filed a separate answer, in which he insisted that he had acted in all respects in conformity with law. In this answer he raised no question of the constitutionality of the act upon which the petition was based. It is true that he did allege in his answer that the act in question was "unconstitutional and void," but this Court held that such an averment "is not sufficient to raise a Federal question, but is to be taken as applying to the Constitution of the State, and not to the Constitution of the United States."

Subsequent to the filing of the original answer in this cause, Kipley asked leave of the Court to withdraw his plea, filed in the mean time, and also to amend his answer so as to embody certain Constitutional objections to said civil service act. His

application for leave to withdraw the plea and to amend his answer, as above indicated, was denied by the State Court and no exception was taken to the ruling of the Court in denying such application. It was insisted in this Court that "the motion for leave to amend the answer did specifically set up and claim that the Illinois civil service act violated certain rights, privileges and immunities belonging to the plaintiff in error under the Constitution of the United States."

In answer to this position this Court held that "as the Supreme Court of Illinois did not allow the proposed amendment of the answer, the question suggested by the amendment did not arise for determination. To the action of the Court in disallowing the amendment no exception, was taken." In this case in passing upon the question of whether this Court should consider the Federal question sought to be presented by the motion to amend, this Court said:

"The grounds upon which these motions were denied appear from the opinion of the Court as follows: 'By this motion respondent Kipley asks, first, for leave to withdraw his plea; second, to file an amended answer; and third, to file a supplemental answer. Nothing more is before us than the bare motion. No showing has been made nor reasons filed in support of the motion, and we are unable to say whether the motion should be allowed or not, and it must therefore be overruled.' People, Akin, v. Kipley, 176 Ill., 638. This action of the State Court does not raise a Federal question which this Court can examine. The suggestion that the Federal questions which would have been raised, if the answer had been amended as proposed, should be considered upon their merits precisely as they might have been if the motion to amend had been allowed, cannot be entertained for a moment.

It was in the discretion of the Court to deny the motion to amend, when no reasons were assigned for its allowance, and to hold the parties to the issues made by the original petition and answers; and there is nothing in the record justifying the conclusion that its discretion, in that regard, was exercised with the intent or so as to deprive the defendant either of any right or immunity to which he was entitled under the Constitution or laws of the United States, or of the privilege of setting up or claiming in due time and in proper form any such right or immunity. It may be observed that the opinion of the State Court delivered upon final hearing contains nothing to show that any Federal question was considered or determined * * * The validity of the enactment in question was considered by that Court with reference only to the State Constitution."

The inevitable conclusion which arises from the foregoing statements by this Court is, that if the motion to amend in that case had been supported as it was in this case, by the affidavit of counsel that the amendment was necessary in order to bring the merits of the controversy between the parties fairly to trial, and that the final trial of the cause would not be delayed by the filing of said amendments, and that said amendments were not asked to be filed for the purpose of delay but in order that the merits of the case might fairly be brought to trial; and if exceptions had been reserved to the action of the Court in overruling the motion to amend, as was done in this case; and if the record had disclosed any fact justifying the conclusion that the discretion of the lower Court had been exercised either with intent to deprive the defendant of any right or immunity which he was entitled to claim under the Constitution or law of the United States, or of setting up or claiming the same; *or*

in such a way as to result in such denial (as was done, whether so intended or not, in the instant case), then this Court would have treated the case just as if the motion to amend had been allowed.

Even if we are mistaken in reference to whether this Court should treat the record in this case as if the amendments had been allowed, we still have the Federal question clearly presented in the first notice filed under the general issues, which was never stricken out, and which was originally filed in connection with the plea of the general issue.

In this notice, the defendant set up and stated that "when said first mortgage was drawn and executed in May, 1892, the laws of Mississippi allowed building and loan associations by express statute to charge more than ten per cent. interest on loans and such interest as might be agreed upon by the parties to such loans." (Transcript, p. 8.)

This statement of the case was amply sufficient to bring to the notice of the Court that defendant, in the court below, claimed the protection incident to the contract clause of the Constitution of the United States (Art. 1, Section 10).

Again, in said original notice, defendant, in the court below, alleged "that said contracts, as shown in said bonds and mortgages executed by said plaintiff, *are New York contracts, and their validity is to be governed and determined by the laws of the State of New York where said contracts are payable.*"

This was simply another method of pleading that defendant had the right to insist, and did insist, upon the protection given by Section 1 of Article IV of the Constitution of the United States.

It is not at all necessary that the Federal questions presented in this case should have been made to appear on the record in direct and unequivocal terms, *in ipsissimis verbis*, but it is altogether suf-

ficient that they should have appeared as they did by clear and necessary intendment.

Crowell v. Randell, 10th Peters, 368.
Murray v. Charleston, 96 U. S., 432., 8th Wallace, 44.
16th Pet. 281; 125 U. S., 345.

The above cited cases clearly indicate that the section of the Constitution of the United States relied on in any given case need not be specifically set forth in the record, and that when the substance of the matter was presented to the State Court, that court must be presumed to have recalled such provisions of the Constitution of the United States as were necessarily involved in the case in controversy.

In Water Power Co. v. Street Railway Co., the Court said:

"To the argument that the Federal right was not specially set up and claimed in the language of the Revised Statutes, Section 709, it is replied that this is not one of the cases, in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here." * * *

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this Court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such questions here."

The same rule is supported by the case of Sayward v. Denny, 158 U. S., 180, and Oxley Stave

Company v. Butler County, 166 U. S., 648, and has been emphasized in the case of Eastern Building and Loan Association v. Welling, 21 Sup. Ct. Repr., 531.

It is sufficient if the Federal question be first raised in the assignment of errors in the State Appellate Court. In the case of Arrowsmith v. Harmoning, reported in 118 U. S., 194, the Federal question was first raised in the third assignment of error in that court, which was in the following words:

"3rd. That by affirming the judgment of the court of common pleas by said district court, this plaintiff in error was deprived of his right of trial by jury, contrary to the provisions of the Constitution of this State, and deprived of his property without due process of law, contrary to the provisions of the Constitution of the United States."

On a motion to dismiss and also to affirm on this state of the record, Chief Justice Waite delivering the opinion of the Court, said:

"This is the first time, so far as the record discloses, that even the semblance of a federal right was set up in the case, and even here it is not easy to see on what ground it could be claimed that Arrowsmith had been deprived of his property in violation of the Constitution of the United States. It was for this reason, perhaps, that the Supreme Court, while affirming the judgment of the district court, took no notice of this assignment of error in its opinion. The decision, however, necessarily involved a denial of the right which was claimed in this way, and thus we probably have technical jurisdiction. For this reason the motion to dismiss must be denied."

"When it is desired to secure the right to review the decision of a state court in the Supreme Court

of the United States, it is the safer practice to make it appear distinctly on the record by a statement either in the pleadings, or as the ground of an objection to the admission of evidence, or in support of an offer of evidence, *or a request to charge,* that a Federal question is involved. This is not, however, indispensable if the Supreme Court can see by an examination of the record that the Federal question was raised and decided adversely to the plaintiff in error."

> Foster's Federal Practice 2nd Ed., Section 477. Curtis on Jurisdiction of United States Courts, 37-39. 112 U. S., 123, 129; 119 U. S., 110, 116. 139 U. S., 293, 295.

In view of the various efforts of the defendant to get the benefit of the Federal questions urged in the lower court, hereinbefore referred to, and in view of the fact that in the Supreme Court of the State the action of the court below, in striking out the amendments raising the questions sought to be raised thereby, and in refusing the peremptory instruction asked by appellant, and granting the peremptory instruction asked by appellee, was specifically assigned for error, the following statement found in the opinion of the Supreme Court of Mississippi in reference to the effort of the defendant to present the Federal question in the Court below, seems to us to be in direct conflict with all of the authorities hereinbefore cited on that subject, as well as the authorities hereinbefore referred to in reference to the subject of pleadings in Mississippi.

"It is clearly shown that the appellant, after its motion to remove the cause to the Federal Court had been overruled July 29th, 1899, filed the plea of general issue, with elaborate notice on Septem-

ber 27th, 1899; that afterwards, without having first obtained leave of the Court, it filed on April 20th, 1901, some eighteen months after the cause was at issue, an amended notice—a wholly different notice—under its plea of the general issue; and that later, on August 6th, 1901, again without having obtained leave to do so, it filed an amendment to its pleas, and an amended—so-called—notice, wholly different from its first notice, some nearly two years after the cause had been at issue and ready for trial. This effort, by these amendments to the pleas and notice, were simply an afterthought, an effort, at that late stage, to inject a Federal question into the record. Appellant also asked an instruction, and filed a series of reasons why the instruction should be granted. It was an extraordinary procedure to file with a requested instruction a page or two of written reasons why it should be granted. The purpose was obvious. It was another ingenious, but unsuccessful effort to inject the Federal question into the record. If the Court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have—an issue involving the Federal question, to which an instruction would have been appropriate. But the Court had very properly, in accordance with our statutes and practice, refused leave to file the amended pleas and notices, and stricken them from the files, on the obvious ground that appellant had presented them entirely too late —nearly two years after the cause had been fully at issue and waiting for trial. Such delay was gross laches, and the Court properly refused the leave to file them" (Transcript, pp. 115-116).

It will be seen from this statement quoted from the opinion of the Supreme Court of Mississippi, that that Court entirely overlooked the fact that

the original notice filed under the plea of the general issue contained *two distinct and sufficient statements of Federal questions relied upon,* as hereinbefore indicated and explained, which statements were amply supported by the proof in the case.

It will further be seen that that Court overlooked the fact that the Federal questions relied upon were distinctly set up in the assignment of errors filed in that Court (Transcript, p. 103).

This statement by the Supreme Court of Mississippi ignores the facts that the amended pleadings sought to be offered were presented months before the trial of the case and were accompanied with an affidavit of counsel that if allowed they would not delay the trial of the cause, and that the same were necessary to bring the merits of the controversy fairly to trial.

While we recognize the fact that ordinarily it is within the discretion of the Court where pleadings are first offered to determine whether such offer is a timely one and should be granted or declined, yet we insist that the action of the Circuit Court of Lauderdale County, which was affirmed on appeal by the Supreme Court of the State of Mississippi, inevitably resulted "so as to deprive the defendant * * * of the privilege of setting up or claiming in due time and in proper form" the questions sought to be raised by such amendments, and that this brings this case within the rule announced in the case of Kipley v. State of Illinois, *ex rel.*, Akin, 170 U. S., 182.

After all it is for this Court to determine whether there is a Federal question in the record, and whether its decision was inevitably involved in the Court below.

In the case of Arrowsmith v. Harmoning, 118 U. S., 194, the Supreme Court of Ohio absolutely ig-

nored the Federal question, or in the language of this Court "took no notice of this assignment of error (which raised the Federal question for the first time) in its opinion," and yet this Court, as we have hereinbefore seen, decided that it had jurisdiction of the case.

In the case of Des Moines Navigation and Railroad Company v. Iowa Homestead Company, 123rd U. S., 552, the Supreme Court of the State of Iowa referred to the Federal questions sought to be presented, but declined to consider the same, just as the Supreme Court of Mississippi did in the present case; but this Court reversed the judgment of the Court below, and referring to the action of the Supreme Court of Iowa, said:

"We cannot look upon the reason given by the Court below for not considering the question of prior adjudication as sufficient for avoiding the decision of a controlling Federal question fairly presented by the pleadings, proofs and assignments of errors, and necessarily involved in the determination of the case. That question stood in the very front of the litigation and if decided in favor of the Navigation and Railroad Company ended the whole matter. To give a judgment the other way without considering it was simply to ignore one of the most important elements of the case as it stood in the record. *There can be no escape from this conclusion.* * * * *Such action was in our opinion equivalent to a decision against the Federal right which was actually set up and claimed, and thus our jurisdiction for the review of the judgment on this question as well as the others is complete.*"

Having shown, as we think, that the Federal questions essential to the jurisdiction of this Court were raised and presented to the State Court in

the proper way and at the proper time, that their decision was necessary to the judgment rendered in the case, that the decision was against the rights claimed, or asserted by the plaintiff-in-error under the Constitution of the United States, it remains to be seen whether such claims of right were correctly adjudicated by the State Court, and, if not correctly decided, whether there is any other matter adjudged by the State Court sufficiently broad to maintain the judgment of that Court.

There is no independent ground, not involving a federal question, broad enough to maintain the judgment of the Supreme Court of Mississippi, found in the record.

We recognize the rule that "if there be more than one question in the record, and one of them is purely a State question, on which the State decision may stand," the writ of error will be dismissed without considering the Federal question.

Hopkins v. McLure, 133 U. S., 380.
Bacon v. Texas, 163 U. S., 207.
Beatty v. Fenton, 135 U. S., 244.

An examination of the cases just cited and of the other decisions of this Court sustaining the rule above announced, will disclose the fact that in all such cases there was a clear clean-cut, independent ground upon which the decision of the State Court could be rested without reference to any Federal question found in the record.

We take it that it will hardly be contended that the instant case furnishes any such independent ground upon which the decision of the Supreme Court of Mississippi and the judgment rendered thereon can be rested. An examination of the opinion of the Supreme Court, found in the record, will

show that there was no recognition by the Supreme Court of Mississippi of a Federal question in the record, and no undertaking on its part, while recognizing such question, to plant its decision upon any other ground, but the Federal question was ignored by the Court as shown by the opinion found in the record.

It is true, that the opinion of the Supreme Court discloses the fact that certain statutes and decisions of the Supreme Court of Mississippi, referred to therein, were relied upon in part as a basis of the decision reached in the instant case, but these statutes were enacted, and these decisions announced, subsequent to the date of the contract by which the appellee first became indebted to the plaintiff in error, at which time the status of the parties became fixed, and the record in this case is full of objections properly but ineffectually interposed in the Court below to the application of said statutes and decisions to the contract there in question.

In such a case, the opinion of this Court in Hopkins v. McLure, 133 U. S., 880, is directly in point.

Mr. Justice Blatchford, delivering the opinion of the Court in that case, referring to the contention of plaintiff in error, "that the decision of the Court below was based upon the application of the act of 1878 as a valid act affecting the contract of the plaintiff in error (which antedated the act) and impairing its obligation," said "but the validity of the statute (meaning the act of 1878) was not drawn in question, and the Supreme Court did not pass upon it. The decree of that Court does not rest upon that statute but upon independent grounds. *The decision rests upon a ground broad enough to cover the entire case without considering the statute.*"

There can certainly be no just contention in this

case that the decision of the Supreme Court of Mississippi rested upon a ground broad enough to cover the case without considering the statutes and decisions of that State which it was insisted should not be applied to the contract in question, and could not be applied thereto without denying "full faith and credit" to the decisions, public acts, records and judicial proceedings of the State where the appellant association was domiciled, and without impairing the obligation of the contract entered into by defendant in error and the plaintiff in error, and without denying appellant the benefit of "due process of law," and also that "liberty" and "equal protection of the laws" guaranteed by the 14th amendment to the Constitution of the United States.

The decision of this Court in the case of Bacon v. State of Texas, 163 U. S., 207, is peculiarly applicable to the facts disclosed in this record.

Mr. Justice Peckham, delivering the opinion of the Court in that case, used the following language:

"If the judgment of the State Court gives no effect to the subsequent law of the State and the State Court decides the case upon grounds independent of that law a case is not made for review by this Court upon any ground of the impairment of the contract * * * The case of Wilmington & W. R. Co., v. Alsbrook, 146 U. S., 279, decides nothing that is repugnant to it. In that case the jurisdiction of this Court was questioned on the ground that the contract of exemption mentioned in the act of 1834 was acknowledged to be valid by the Supreme Court of North Carolina, and it simply denied that particular property was embraced by its terms, and as a consequence it was claimed that the decision did not involve a Federal question. To which this Court replied speaking by Mr. Chief Justice Fuller as follows: 'In arriving at

this conclusion, however, the State Court gave effect to the revenue law of 1891 and held that the contract did not confer the right of exemption from its operation. *If it did its obligation was impaired by a subsequent law and as the inquiry whether it did or not was necessarily directly passed upon we are of the opinion that the writ of error was properly allowed.'"*

So, here, we insist that the inquiry whether the application of the statutes and decisions, referred to in the opinion, to the instant case, involved any of the Federal questions raised in the State Court, was inevitably involved and necessarily passed upon or ignored (which amounts to the same thing) by the Supreme Court of Mississippi, and the merits of such questions must be passed upon by this Court, notwithstanding the fact that the Supreme Court of the State of Mississippi treated the case as if there was no Federal question involved in it.

"If a Federal question is fairly presented by the record and its decision is actually necessary to the determination of the case, a judgment which rejects the claim but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes as if it had been specially referred to and the right directly refused."

Chapman v. Goodnow, 123 U. S., 540-548.

"Where the jurisdiction of this court is invoked upon the ground that a right or immunity specially set up and claimed under the Constitution or authority of the United States has been denied by the judgment sought to be reviewed it must appear from the record of the case either that the right so set up and claimed was expressedly denied or that such was the necessary effect in law of the judgment."

Edward Roby v. Chas. W. Colehour, 146 U. S., 153.

Merits of Federal Questions Presented.

We now come to the consideration of the merits of the Federal questions raised in the court below, which involve a proper construction of the contract obligation of the parties as fixed by the Articles of Association of the plaintiff in error and the statutes and decisions of the State of New York, together with the statutes and decisions of the State of Mississippi as sought to be applied to the case in hand.

We insist that the written contract, the Articles of Association of plaintiff in error, and the provisions of Chapter 122 of the Laws of New York, of 1851, and Chapter 564 of the laws of New York of 1875, are the measure, and only measure, of the rights and obligations of the parties hereto, and we further insist that this is just as true when this contract comes to be construed by the Courts of the State of Mississippi, as if the Courts of New York were called upon to construe the same contract.

"The charter of a corporation, or the statute under which it is organized, furnishes the guide in determining the liability of its stockholders to its creditors * * * The reason of this rule is obvious. A person guilty of no wrong ought not to be subjected to a burden or liability which he has not voluntarily assumed. And *by accepting shares in a foreign corporation* a person is rightfully supposed to have had in view the law governing such corporation and not the law of his own domicile, unless there is such a law specially applicable to his situation. On the other hand one who accepts shares of the stock in a foreign corporation takes upon himself the burden imposed by the charter of such corporation, or the law of its domicile by

which it is governed. *He is supposed, in a certain sense, to go into the state in which such corporation is domiciled; to cast off for a time the vesture which his own state throws around him and to put on that of such other state.* Nor can he plead ignorance of such laws any more than one can plead ignorance of the laws of another state when he makes a contract to be executed therein. Subject to exceptions, hereinafter stated, those laws are administered in the courts, state or federal in which the action to charge the stockholder is brought, *as rules of property* obligatory not only in the state enacting them but everywhere else."

Commentaries on the Law of Corporations by Thompson, 3rd Vol., Sec. 3046.

The exceptions, above referred to, are the well recognized rules that if there is any valid and operative legislation in the state of the stockholders domicile imposing some other or distinct liability upon him as a stockholder in a foreign corporation, the legislation of the stockholder's domicile will apply, and if the foreign statute is penal in its nature it can have no extra territorial operation and will not affect a non-resident stockholder.

Neither of the exceptions above referred to can apply with any sort of force here for the reason that the statutes of New York, in reference to the subject matter in hand, were in no sense penal, and there are no statutes in the State of Mississippi which impose upon a Mississippi stockholder in a foreign corporation any duty or obligation distinct or indifferent from that fixed by the law of the domicile of the foreign corporation of which he may happen to be a member, so that the rule above announced literally applies to the instant case, and, when the courts of Mississippi refused to recognize and apply the same, by such act, "full faith

and credit to the public acts, records and judicial proceedings of the State of New York, was denied to plaintiff in error, its contract with its stockholder was impaired, and it was further denied the equal protection of the laws," and "liberty" of contract guaranteed by the Constitution of the United States and the amendments thereof.

We take it that there will be no sort of contention here that the contract between plaintiff in error and defendant in error was not a valid contract duly enforceable according to the laws of the State of New York. Section 7 of chapter 122, passed April 10th, 1851, and entitled "An Act for the incorporation of building, mutual loan, and accumulating fund Associations" of the Laws of New York, is as follows:

"Every such corporation shall terminate except for the purpose of settling its affairs whenever all of the shares thereof shall be redeemed by advances thereon, or whenever the owners of unredeemed shares shall be paid the ultimate value thereof as provided in the articles of association and not sooner; but no dividend of principal or of profits shall be made until such termination, nor until all of the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt for making the monthly payments provided in the articles of association upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for nonpayment of dues or fees or other violation of the articles of association *nor shall the making of any monthly payment required by the articles of asso-*

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ciation or of any premiums for loans made to members be deemed a violation of the provisions of any statute against usury."

The Act of 1851 of the State of New York, from which the above mentioned section is quoted, is still in full force and effect in that State, as to corporations organized under it, with the exception of certain minor amendments which were made to the act by chapter 564 of the Laws of New York, 1875, and which have no sort of connection with this case.

The case of Association v. Read, reported in 93 N. Y., page 474, and other cases of similar character, leave no doubt as to the validity of the contract between the parties hereto when considered and treated as a New York contract.

The opinion of the attorney general of New York, found on pages 81, 82, and 83, of the Transcript, in reference to the legality of fixed premiums under the Act of 1851, chapter 122 of the Laws of New York, both because of its source and inherent force, is entitled to due consideration here and elsewhere.

In this connection we again call the Court's attention to the fact that under Section 939 of the Annotated Code of Mississippi, 1902, "when any question shall arise as to the law of the United States or of any other State or Territory of the United States * * * the Court shall take notice of such law in the same manner as if the question arose under the law of this State."

By reference to the terms of this statute it will be seen that the Courts of Mississippi take judicial notice of the laws of all of the other States of the Union" *in the same manner as if the question arose under the laws of this State."*

Of course every presumption of law is that the Courts of Mississippi not only take notice of the laws of Mississippi, but that they take a *correct* view thereof. In other words, it is only fair and

respectful to the Courts of Mississippi to assume that they have a correct knowledge of the laws of that State.

Under the statute above referred to and quoted, the Courts of Mississippi are required to take notice, or, in other words, to have knowledge of, the laws of the other States of the Union. This statute was intended to avoid the necessity of proof in cases involving the laws of other States, and as a matter of course, it was intended to supply the place of correct proof of such other laws, so that whenever, in the decision of any controversy, the Courts of Mississippi are required to construe the laws of other States, the decisions of those Courts are to be treated and acted upon just as if such decision was rendered with a full, accurate and discriminating understanding of the laws of the States passing under review.

This fact clearly differentiates the instant case from the recent case of Eastern Building and Loan Association of Syracuse, New York, v. Bright Williamson, decided by this Court and reported in the advance sheets containing the decisions of this Court delivered at the October term thereof, 1902.

There is no statute in South Carolina, such as is found in Mississippi, requiring the Courts of that State to take notice of the laws of other States, and it became necessary in that case to offer proof of the laws of New York, in reference to building and loan association contracts similar to the one involved in that case; and such evidence was offered, but the Supreme Court of South Carolina did not accept the view of the law offered in evidence by counsel for defendants in that case, and it was contended that in declining to do so that Court denied "full faith and credit to the public acts, records and judicial proceedings" of other States. This Court held in that case that "no witness can conclude a

Court by his opinion of the construction and meaning of statutes and decisions already in evidence," but that it was the province of the Court of South Carolina to construe the statutes, decisions, articles of incorporation and by-laws offered in evidence in such Court and that such construction did not involve a "denial of the full faith and credit," which, by U. S. Const., Article 4, Section 1, must be given by the Courts of each State "to the public acts, records and judicial proceedings" of other States.

It is worthy of notice that in this case the South Carolina Court took the same view of the contract in question which this Court and the Court of Appeals of New York, the State of the domicile of the building and loan association whose contract was being construed, adopted in reference to the contract there in question, but we do not contend that an erroneous construction of the contract, if such had been made by the South Carolina Court, would have involved a denial of "full faith and credit," &c.

Not so, however, in Mississippi. If the Courts of Mississippi fail to give that "faith and credit," which the Constitution of the United States requires, to the "public acts, records and judicial proceedings" of other States, they do so with full knowledge of the laws of other States imposed upon them by the statute of the State, hereinbefore quoted, and this amounts to a denial under the Constitution of that "faith and credit" guaranteed by the Constitution to the "public acts, records and judicial proceedings" of other States.

Defendant in Error Could Not Borrow Money of Plaintiff in Error Under the Laws of New York and Settle for the Same Under the Laws of Mississippi Enacted or Announced Subsequent to the Time when the Relations of the Parties Became Fixed.

The right to borrow money from the building and loan association of which he was a member, was an indisputable right incident to Brahan's membership in the appellant association, provided only that he complied with the rules of the association applicable alike to all members desiring to borrow money.

We have already seen in the quotation from Section 125 from Endlich on "Building and Loan Associations" (2nd Ed.) that "It (meaning the association) agrees to let him have the use of the money advanced during the continuance of the society's legal right, or the running of a series provided he lives up to the terms of his undertaking."

Not only is this the general law, but as heretofore seen under Article 13 of the articles of association of the appellant, "*any member can borrow on his shares ninety per cent. of the withdrawal value thereof upon executing* such note, bond or other instrument as the board of directors may require together with an assignment of the shares as security."

In this connection it will be remembered that defendant-in-error applied for membership in the appellant association and also for a loan from said association on the 30th day of April, 1892 (Transcript, pp. 68-69).

He was admitted into the membership of said association and borrowed the sum of $2,500.00 un-

der the rules and regulations of said association, and executed a bond for that amount, and an assignment of his shares of stock and a mortgage to secure said indebtedness on the 4th day of June, 1892. The bond provided for payments *"at the office of the association in New York City"*; it also provided that said defendant-in-error should *"truly keep and perform all the conditions herein contained and required by the articles of association of said obligee and by such amendments as may be lawfully made to said articles."*

The mortgage provided, among other things, *"for the payment of said sum of $2,500.00 to the said association at its office in the City of New York*, with interest for the same at six per cent. per annum until paid, together with a monthly premium of $12.50 for eight years, or until the earlier maturity of said shares should they mature before the expiration of eight years, and the sum of $15.00 for the monthly dues on the said twenty-five shares, which interest, premium and dues are payable monthly on or before the last business day of each and every month *at the office of the association in the City of New York*, until the maturity of said shares, except the monthly premium which is to be paid for eight years only." This mortgage was executed on June 4th, 1892 (Transcript, p. 106).

"And it is expressly agreed by and between the parties hereto that this mortgage is made with reference to and under the laws of the State of New York, which are to govern in enforcing and expounding this contract" (Transcript, p. 26)."

It will thus be seen that the relation of the parties hereto became fixed not later than June 4th, 1892, when said mortgage was executed and said loan was made.

This Court, in the case of H. L. Bedford, *et al.*, v. Eastern Building and Loan Association of Syr-

acuse, New York, reported in Volume 181 of the Reports of the decisions of this Court, decided and held that:

"The issuance of a certificate of stock to a member of a foreign loan association and his application for a loan made before the passage of a statute restricting the right of the association to do business in the state, constitute a contract, the obligation of which cannot be impaired by such statute; and, therefore, a loan made on that application after the statute was passed and to which his contract gave him a right is valid notwithstanding the statute."

The court further held, in the same case, that "A contract of a foreign loan association which is not usurious under the laws of the state where the association is domiciled, and where the obligations are payable, cannot be attacked for usury in the state where the land mortgaged is situated."

The facts in that case, and the facts in the instant case, are very similar, though there was very much more room for the contention that the Eastern Building and Loan Association of Syracuse had become domiciled in the State of Tennessee, than there is in the instant case to insist that the appellant association had become domiciled in the State of Mississippi.

Section 1 of Article 15 of the by-laws of the Eastern Building and Loan Association of Syracuse, provided that "Each shareholder for each share named in their certificate shall be entitled to a loan of one hundred dollars from the association, provided they shall first make application for such loan upon a blank furnished by the association for that purpose if the condition of the loan fund in the treasury shall warrant it."

As before stated, Article 13, of the Articles of Association of the appellant association, provides

that "any member can borrow on his shares ninety per cent. of the withdrawal value thereof," &c., subject to certain conditions named therein; this however, applies to loans on shares which already have a value, and where no mortgage on land is given.

In other words, the right to borrow is a right incident to membership in either of these associations, though there are some minor differences in the by-laws of the one and the articles of Association of the other association, as to the amount which can be borrowed and the conditions upon which the loan is to be made to the members of said associations.

In the Bedford case Mr. Justice McKenna put the whole case in the following question, "Did the subscription to the stock of the association, its issuance, and the application for a loan in pursuance of it, constitute a contract which was inviolable by the state legislature?" He expressed the opinion of the Court in an answer, which was almost as brief, as follows: "We think the answer should be in the affirmative. By his subscription to stock of the association Bedford became a member of the association, bound to the performance of what its by-laws and charter required of him, and entitled to exact the performance of what the by-laws and charter required of the association. Each acquired a right to what the other promised, and there were all the elements of a contract."

So, here, we insist that Brahan's subscription to the stock of the appellant association, its issuance, his application for a loan, the advance granted thereon, the execution of the bond to evidence the loan and of the assignment of shares, and of the mortgage to secure the same, constitute a contract between the parties hereto which the legislature of the State of Mississippi could not impair.

Neither could it be impaired by any judicial construction by the Supreme Court of the State of any statute passed subsequent to the execution of the contract, nor by the announcement by that court of any public policy of the state in reference to similar contracts, which announcement did not antedate the contract.

We understand the rule to be that Section 10 of Article 1 of the Constitution of the United States, was not intended to embrace judicial decisions under the ward "law," and the ordinary acceptation of that term does not embrace judicial decisions, though in the case of Pine Grove Township v. Talcott, 86 U. S. Reports, L. Ed., 22 p. 233, Mr. Justice Swayne, delivering the opinion of the Court, used the following language: "The national constitution forbids the states to pass laws impairing the obligation of contracts. In cases properly brought before us that end can be accomplished unwarrantably no more by judicial decisions than by legislation. Were we to yield in cases like this to the authority of the decisions of the Courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery."

"But the prohibition is directed against the legislative action of the State (whether by the legislature or by a constitutional convention) and not against the determinations of its judicial department. The obligation of the contract must have been impaired by some law, that is, some constitutional provision or statute. A judgment of the Supreme Court of a state will not be reviewed

by the Supreme Court of the United States, on a writ of error, on the ground that the obligation of a contract has been impaired, *unless some legislative act or constitutional provision has been sustained by the judgment.*" Black's Constitutional Law, Second Edition, page 605-606.

"JUDICIAL DECISIONS.—While ordinarily, judicial decisions are not laws of the state, as that term is used in the constitutional provision under consideration, yet judicial decisions construing constitutional provisions, statutes, and ordinances are, in a practical sense, a part thereof, and a change of decision may have all the practical effect of the adoption of a new constitutional provision, statute, or ordinance; and if the last construction has the effect of impairing the obligation of a contract entered into while the prior decision was regarded as having established the law, the last decision must be disregarded in adjudicating the rights of the parties" (Amer. & Eng. Encyc. of Law, 2nd Ed., Vol. 15, p. 1046).

Turning to the opinion of the Court in this case, it will be seen that the Court refers to other cases which will have to be examined in order to determine exactly what law was applied to the contract involved in the case before the Court. The first sentence found in the opinion is as follows: "This case is controlled on the direct appeal as to the loan made under the Code of 1892 (meaning the loan made on the 3rd day of September, 1894) by the cases of National B. & L. Association, &c.—this same appellant—vs. Wilson, 78 Miss., 993; Shannon vs. Georgia State B. & L. Association, 78 Miss., p. 955, and the authorities there cited" (Transcript, p. 104).

"On the cross appeal, as to the loan made under the Act of 1886 (meaning the loan made on the 4th day of June, 1892), the case of this same appellant

v. Pinkston, controls (79 Miss., p. 468)" (Transcript, p. 106).

In this connection it should be remembered that the Annotated Code of Mississippi took effect on the first day of November, 1892 (See Code, Sec. 2).

Turning to the Shannon case, we find the following announcement by the Supreme Court of Mississippi: "The premium in this case was fixed and the contract was, therefore, usurious. See the case of Sokoloski and Crofton, 77 Miss., 155-166."

Turning to the Sokoloski case, we find the rule announced in the syllabus as follows: "Ten per centum being the maximum rate of lawful interest, the contract of a non-resident building and loan association stipulating for six per centum per annum as interest, and six per centum to be paid per month as fixed premiums upon a loan, is usurious."

The closing sentence of the opinion of the Supreme Court of Mississippi in that case is as follows: "The contract for the taking of six per centum premium and six per cent. interest is opposed to our public policy, and is usurious and void."

Volume 77 of the Mississippi Reports embraces the "Report of cases decided by the Supreme Court of Mississippi at the March Term, 1899, December Special Term, 1899, and March Term, 1900," as will appear by reference to the title page thereof, and to be more specific, the Sokoloski case was decided on the 15th day of May, 1899, which only lacked a few days of being seven years after the relation between the parties hereto and their rights under the contracts in controversy became fixed.

In this connection we beg leave to suggest to the Court that while there are two loans, one made in 1892 and one made in 1894, involved in the controversy in this case, Brahan's right to demand a loan of the appellant association, which, as before

stated, is incident to his membership in the same, bears date from the date of his membership in the association in May, 1892, and the stock issued to him at that time forms the predicate of both loans.

The first loan was made in May, 1892, and the second loan was made in August, 1894. Ans. 24 (by Wm. Gibson) (Transcript, p. 42).

Chapter 13 of the Acts of 1886, hereinbefore copied in full, was the statute in reference to the rate of interest when the first loan was made, but, as before stated, the Code of 1892 (known as the Annotated Code of Mississippi) went into effect on the 1st day of November, 1892, and Section 2348 of that Code (also hereinbefore copied in full) was the statute of the State of Mississippi in existence in reference to the "legal rate of interest" in that State when the second loan was made.

We insist, however, that the laws of New York, and not the laws of Mississippi, whether found in the Acts of '86 or the Code of 1892, determine the rights of the parties to this controversy; but if mistaken in this, it is certainly true that the rule announced in the Sokoloski case, nearly seven years after Brahan became a member of the appellant association, cannot be applied to the contracts in question without impairing the obligation of the same, and denying "full faith and credit to the public acts, records and judicial proceedings, of the State of New York."

It will be seen, by reference to the Sokoloski case, that no previous opinion of the Supreme Court of Mississippi is referred to therein as sustaining the doctrine therein announced; and it will further be seen, by reference to the Crofton case, referred to in the opinion of the Court in the instant case in connection with the Sokoloski case, that the Sokoloski case is referred to to support the doctrine an-

nounced therein. In the latter case Whitfield, Justice, delivering the opinion of the Court, says, "as to the usury, we have held in Sokoloski vs. New South *Building and Loan Association* * * * that a fixed premium of six per centum, together with a further charge of six per centum as interest, *eo nomine,* makes the *building and loan contract usurious."*

These opinions, as appears by the opinion in the Crofton case, were delivered on the same day, and they announced a new doctrine in reference to building and loan contracts in the State of Mississippi, and, as we shall undertake to show, the rule announced therein was in direct conflict with previous adjudications of the same Court upon the same subject.

In the case of Sullivan vs. B. & L. Association, decided in 1892 and reported in 70 Miss., p. 99, the question arose for the first time in Mississippi, whether the payment of a premium by a borrowing member from a building and loan association made the contract usurious. In that case Sullivan bid off a loan of $1,000.00 at a premium of forty per cent. and executed his obligation therefor, and received $600.00, "being the face value of the loan less the premium of forty per cent."

He subsequently filed a bill in the Chancery Court of Hinds County, Mississippi, alleging that the contract was usurious, and that he was entitled to recover "back from the association all amounts paid by him to it in excess of $600.00 and to have his note and trust deed surrendered and cancelled."

Woods, Justice, delivering the opinion of the Court, said:

"The questions involved have been so often and so exhaustively considered by Courts of last resort that it appears like beating threshed straw to do more than announce the views of this Court.

1. The premium of $400.00 represents the discount agreed to be made upon the future and uncertain dividends of appellant's shares of stock in the association. It is the difference, estimated by the association and its borrowing member, between the par value of the member's shares of stock and their present real value. It is the bonus which appellant might lawfully agree to pay for a present advancement in cash of a sum certain for the virtual transfer to the association of his shares of stock, which, in the final winding up of its affairs, may realize the sum actually received by the member, together with the premium, bid, or which may not. It is not a deduction of money belonging to him, for, at the time of the transaction, appellant had only a future interest in the association's earnings and accumulations. It is not a pre-payment of that amount by appellant, for the premium of $400.00 will be paid, it at all, when the $600.00 advanced is repaid.

We are of opinion, therefore, that the premium does not render the contract usurious."

It was contended in that case that the Act of 1886, allowed the B. & L. Association to charge interest upon the premium of $400.00, to which contention the Court replied as follows:

"And this brings us, in an orderly way, to the contention of appellee's counsel that such legislation is found in the acts of our legislature, 1886, p. 35. We cannot agree with the learned counsel. The utmost that this remarkable act can be said to do is to authorize building and loan associations to stipulate for and demand a greater rate of interest than ten per cent. per annum 'for any money advanced or loaned' by it. Legislative tenderness for such corporations has not yet gone, as counsel suppose, to the violent extreme of permitting even

these favored associations to stipulate for and demand any extortionate rate of interest which its greed and its borrowing member's necessity might fasten upon the unhappy and necessitous creature, on any imaginary sum of mythical money which they agreed to name, even though such sum was never seen by the member, and even though such sum had no existence in fact, at the time of the transaction. For the present, the borrowing member can only be constrained to pay extortionate and usurious interest upon 'money advanced or loaned' —money which he actually received and had, and not upon forty per cent. of all his shares of stock in the association, which he has virtually transferred to the association, under the name and in the form of a premium."

It is true that the Building and Loan Association in that case was a domestic association, but it is perfectly clear from the opinion as a whole that the Court did not regard that fact as in any wise controlling the decision of the case. The opening paragraph of the opinion, "That the questions involved have been so often and so exhaustively considered by courts of last resort," etc., shows conclusively that the Court was treating the questions involved with reference to well known rules of law applicable thereto and not with reference to any particular State statute.

The other paragraph of the opinion above quoted, "and this brings us in an orderly way to the contention of appellee's counsel that such legislation is found in the acts of our legislature, 1886, p. 35." (Chapter 13, hereinbefore quoted at length), shows that up to that time the Court had not considered the effect of the Act of 1886, and in speaking of that Act, the Court said, "*The utmost that this remarkable act can be said to do is to authorize building and loan associations to stipulate for and de-*

mand a greater rate of interest than ten per cent. per annum for any money advanced or loaned."

It will be seen that the Court treated this act in that opinion as applying to building and loan associations generally, because there is not a word in the opinion about the application of the act to domestic building and loan associations as distinguished from foreign building and loan associations. The act itself makes no such distinction (though as we shall subsequently show the Supreme Court of Mississippi in the Pinkston case, referred to and relied upon as authority for the instant case, held that the act applied only to domestic building and loan associations) and if the act had been limited in terms, or in the opinion of the Court, to domestic building and loan associations, there would have been no sort of occasion to have referred to the same as *"this remarkable act," or to* have spoken of the "legislative tenderness for such corporations," for certainly such consideration for domestic building and loan association found in quite a number of acts of the various States could neither be considered "remarkable" nor referred to as exhibiting any undue amount of legislative tenderness.

In the case of Goodman v. Loan Association, decided in 1893, and reported in 71 Miss. Rep., on pages 234, 325, Chief Justice Campbell, delivering the opinion of the Court, said:

"We reject the notion that because no statute of this State expressly authorizes the creation of building and loan associations, therefore, none could be formed under the general law for incorporations. Under the general law, any corporation not prohibited could be formed with any customary and appropriate powers not inconsistent with law. The vital principle of such associations, as known to us, is compounding monthly receipts,

whereby to produce astounding results, for the mutual benefit of all concerned, and what is called a fine (merely an agreed sum as liquidated damages) is imposed for every default in payment, as a spur to prompt payment, so as not to derange the process of compounding, which must fail if there is want of payment as agreed and failure of which would cause failure of the scheme. *We see nothing wrong in members of full age and compos mentis mutually binding themselves to so beautiful a scheme for reciprocal advantage, and being held to the performance of what they have agreed.*"

Manifestly, this opinion was not based upon a State statute, because it is expressly stated therein that "no statute of this State expressly authorized the creation of building and loan associations"; the Court further says that "any corporation not prohibited could be formed with any customary and appropriate powers (under the general law) not inconsistent with law," and yet we see from that portion of the opinion above quoted the Supreme Court of Mississippi in 1893, understood the "vital principles of such associations" • • • and saw "nothing wrong in members of full age and *compos mentis*" becoming members thereof and being held to the performance of their contracts.

That we have rightly construed the early decisions of this Court is evidenced by the fact that Endlich on Building Associations, in collating and stating the views of the different State Courts on the subject of loans or advancements to members, classes the State of Mississippi among the States upholding the validity of such loans against the charge of usury (See Endlich, 2nd Edition, page 313).

The same view of the earlier Mississippi decisions is taken by Thornton & Blackledge on Building and Loan Associations, Section 248, and by

Thompson (2nd Ed.), Section 192. Hence every text writer supports our contention that the Sokoloski decision represents a change in the jurisprudence of the State of Mississippi.

In the case of Manship, *et al.*, vs. New South Building and Loan Association, *et al.*, reported in 110 Fed. Rep., page 845, which was a case tried before the Circuit Court of the United States for the Southern District of Mississippi in 1901, Judge Niles recognized the fact that there had been a marked departure from the previous decisions of the Supreme Court of Mississippi in the Sokoloski case. After quoting the opinion delivered by Chief Justice Campbell in the Goodman case, the Court said: "With this statement of the Court I fully concur. Liberty to contract is one of the essential elements of freedom and one of the most valuable rights incident to our institutions, and it is very difficult for me to see any reason in law or morals why a party desiring to become a member of a building and loan association may not do so, and if he desires that a part of his contributions shall be credited upon the amount borrowed by him, and that a part shall go to swell the loan fund of the association to be loaned to his fellow members of the association, and in this way swell the profits and increase the value of his stock therein and thereby hasten its maturity, I see no reason why he should not be permitted to do so and why his contract might not be enforced according to his agreement; and, furthermore, I fail to understand what right the Court which may be called upon to enforce such contracts has to appropriate his stock payments or his payments of premiums in any other way than he agreed that they should be appropriated."

While recognizing and following the rule announced in the Goodman case, Judge Niles, in the

same opinion, referring to the Sokoloski case, declined to follow it, assigning as a reason therefor that "The Supreme Court of Mississippi followed the misleading statements of the law, found in Endlich on Building Associations, in reference to the effect of "fixed premiums" upon building and loan contracts, in Sokoloski v. Association, and that doctrine, though there is no similar statute to the one quoted (by Endlich) from Ohio in this State, seems now to be thoroughly established in Mississippi; *but I decline to follow the Sokoloski case*, and other cases following it, in this particular, because, in my judgment, the Court in that case was misled by the statement of an author who did not find any support for the doctrine announced by him in the authority to which he referred."

Not only is the decision of the Supreme Court of Mississippi in the instant case a complete departure from the earlier decisions of the same Court on the question of usury and the construction of the statute of 1886, but it also ignores the decision of that Court rendered in 1893 in the case of Loan Association vs. Shields, reported in 71 Miss. In that case, a borrowing member of the association withdrew from the same and made a voluntary settlement therewith, just as Brahan did with the appellant association and afterward brough suit against the association, just as was done in this case, to recover on account of the alleged usurious character of the contract.

On this state of case, Woods, Justice, delivered the opinion of the Court, which we quote in full:

"As a matter of fact, the appellee paid less than ten per cent. per annum interest on the amount of money actually advanced or loaned to him. His contract, most unfavorably construed for appellant, required the payment of lawful interest on the amount of his bid; the record finally shows that

he paid less than lawful interest on the sum really received by him. It is difficult to conjecture where any claim of usury can be tenably planted.

But independently of this, the appellee, on repaying his loan and withdrawing from the association, voluntarily made the settlement plainly shown in the record, and this he did with full knowledge of all the facts. In this voluntary settlement he made no mistake of fact; he has received subsequent enlightment of law, as he now supposes. In this voluntary settlement made with his eyes open, he received seventy-two and one-hundredths of the premiums bid by him, which was returned as unearned, and he received his share of all the profits made by the association, during his membership and while enjoying the money loaned him, and these profits embraced his ratable part of all interest paid by all borrowing members, himself and others. In that settlement he took as his own his part of all interest now supposed to have been usurious and yet holds it.

A peremptory instruction for defendant should have been given."

We insist that these earlier decisions of the Supreme Court of Mississippi, and especially the decision in the case of Sullivan vs. B. & L. Association, in which the statute of 1886 was first considered by the Courts of that State, "are in a practical sense a part thereof," and the statutes quoted in the Shannon and Wilson cases reported in 78 Miss., upon which the decision in the instant case relies as controlling the rights of the parties hereto, as construed by the Supreme Court of Mississippi in those cases and the case in hand, inevitably impair the obligation of the contract made between the parties hereto.

The Supreme Court of Mississippi, by its decision, deprived the appellant association of its "Liberty" and "Property without due process of law," and also denied it "the equal protection of the laws," contrary to the provisions of the fourteenth amendment.

"This clause (of the Fourteenth Amendment) operates upon all agencies by which State law is made and enforced, all departments of State government, legislative, executive, *judicial,* and all subordinate agencies.

The clause of equality before the law protects not only natural persons, but also those artificial persons called corporations, it regarding them as persons under it.

What is the practical meaning of the clause? Its words, "equal protection of the laws," in themselves are a good general definition, especially when we come to the task of applying them to a particular case. None but general definitions, which are innumerable in varying phrase, can be given. *We can only apply it to cases as they come.* What is now equal protection would not have been so heretofore; what is now such may not be such in future. Times, society, and their wants change. Take the police power of a State. What would infract the amendment now, may not do so some years hence. The needs of government change with changing conditions. Wonderful is the great number of cases, not only in the State, but in Federal Courts, involving this amendment. Everybody who is in stress these days is appealing to the Federal Courts for protection; and as said in Holden v. Hardy by the Supreme Court, these cases 'demonstrate that in passing on the validity of State legislation un-

der it, this Court has not failed to recognize the fact that the law is, to a certain extent, a progressive science!' "

Brannon on the Fourteenth Amendment, page 319-320.

Justice Field in the opinion in Barbier v. Connolly said the Fourteenth Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person equal protection of the laws," undoubtedly "meant not only that there should be no arbitrary spoliation of property, but that equal protection and security should be given to all alike under like circumstances, in the enjoyment of their personal and civil rights * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuit by others under like circumstances."

Brannon on the Fourteenth Amendment, page 315, under the title of "Equal Protection of the Law," says, "We have seen how far-reaching are the clauses of Section 1 of the Fourteenth Amendment relative to the rights, privileges and immunities of citizens of the United States, and the prohibition against all state action depriving persons of life, liberty or property without due process of law; but far reaching and wide as are those clauses, the framers of the amendment were not content with them, but added another clause providing that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The authors of the amendment inserted this clause as a safety clause in order to guarantee rights which might not fall under the protection of the antecedent clauses, and under them secure rights given by the laws.' What does this clause mean? It is difficult to say; nor is it safe to say. As the Su-

preme Court has said with reference to other clauses it is impracticable, not desirable, and dangerous to attempt in advance any inflexible, unchangeable, cast-iron rule or application. *Each case must stand on its own features and merits as it arises in the course of time and in changing conditions and necessities.*

"Antecedent to the Fourteenth Amendment, the Supreme Court of Tennessee used language seeming to be prophetic of its coming and vindicative of its policy in Wally's Heirs v. Kennedy (2nd. Yerg. Tenn., 554). The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by according remedies leading to similar circumstances is unconstitutional and void."

"PROPERTY" PROTECTED BY THE FOURTEENTH AMENDMENT.

The term "property" as used in the Fourteenth Amendment has been defined to be "anything in which the law allows ownership by man is property under this amendment. It may be real, personal or mixed; it may be corporeal or incorporeal * * * in short anything capable of beneficial ownership."

Brannon on the Fourteenth Amendment p. 118.

"LIBERTY" PROTECTED BY THE FOURTEENTH AMENDMENT.

The term "liberty" as used in the Fourteenth Amendment, while not easily defined is an exceedingly comprehensive term, and it will doubtless be-

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come more comprehensive and all-embracing as the country grows in wealth, and population, and the ever-increasing ingenuity and enterprise of our people find new avenues for their operation. It has been defined to mean "exemption or immunity from unlawful imprisonment or detention of the body, freedom to go and come on lawful business or pleasure commonly called the right of locomotion; the right to acquire, hold and convey property; *the right to make contracts and to labor in any calling to earn a living*, to marry and have a family."

"Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life and raiment and home be taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed, under all civilized governments, than this right of contract."

Brannon on the Fourteenth Amendment, p. 111.

In the case of Algeyer v. State of Louisiana, 165 U. S. Rep., this Court held that:

"The right of a citizen of a state to send a notification by mail to an insurance company in another state, which is not authorized to do business in the state where he resides, in order that insurance previously provided for by a valid contract made and to be performed outside the state might attach to the property specified in a shipment mentioned in the notice, although the property was then within the state, cannot be prohibited by a state statute, since that right is included in the 'liberty' of the citizen which is protected against deprivation without due process of law.

The privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling

property, embraces the right to make all proper contracts in relation thereto."

To paraphrase this statement of the law upholding the "liberty" of a citizen of one state to carry out his contracts entered into in another state and apply the same to the instant case, we would say that the right of F. V. Brahan to become a member of the appellant association, to borrow money therefrom, to secure its payment, and to voluntarily pay the same, and the correlative right of the defendant association to accept Brahan as a member, to lend him money, to receive payment voluntarily made by him, and to *keep it* after it was so paid, are rights which cannot be denied without invading the liberty of contract possessed by each of these parties, depriving the appellant of its "property without due process of law," and denying appellant the "equal protection of the laws."

The instant case is fully as strong on the vital facts connected with the contract in question, as the Algeyer case, and has this advantage on the legal questions involved in favor of plaintiff in error, that there was no statute of the State of Mississippi, either at the time that the contract between the parties was made, or at the time of the settlement of the same, which prohibited the doing of anything which was done by either of the parties in the State of Mississippi. Whereas, in the Algeyer case, the statute, Number 66, of Louisiana laws, of 1894, provided that "any person, firm or corporation who shall fill up, sign or issue in this State any certificate of insurance under an open marine policy, or who in any manner whatever does any act in this State to effect for himself or for another insurance on property then in this State in any marine insurance company which has not complied in all respects with the laws of this State shall be subject to a fine of $1,000.00 for each offense," etc.

We recognize the fact that the State of Mississippi had the power, if it had seen fit to exercise it, to name the terms upon which the appellant association should be allowed to do business in Mississippi, and that if appellant had seen fit to do business in the State in violation of such terms, with parties to whom it owed no contract obligation prior to the interposition of such terms, it could have claimed no protection under the constitutional provisions now insisted upon.

This rule of law forms the predicate of the decision in the recent case of Chattanooga National Building and Loan Association v. William H. Denson *et al.*, decided by this Court and reported in 189 U. S., 408, and has been recognized in all of the decisions of this Court on that subject; but it has no application here for the simple reason that there never has been a statute in the State of Mississippi which undertook to regulate the transaction of foreign building and loan associations with its members in that State.

Justice Calhoun, in the case of Building and Loan Association v. Pinkston, 79 Miss., used the following language: "At the date of the act (meaning the Act of 1886, hereinbefore quoted in full) no law of this State regulated foreign building and loan associations or prescribed any terms of their doing business here."

It is true that this expression is found in a dissenting opinion, but the dissenting opinion was rendered on other grounds, and there can be no dispute about the correctness of the above quoted statement. The only statute in the State in reference to this matter, which has been enacted since (save and except revenue statutes which throw no light on the matters in controversy) is that found in Section 2348 of the Annotated Code of 1892, regulating the rate of interest in that State. This

statute has hereinbefore been quoted in full, and by reference thereto it will be seen that *it does not undertake to prescribe any terms upon which foreign building and loan associations shall do business in the State of Mississippi.*

It is true that the last clause of Section 849 of the Code of 1892 provides, in reference to foreign corporations generally, that "such foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

This provision of the statute is quoted in the opinion of the Supreme Court of Mississippi in the instant case, but by reference thereto it will be seen that there was no application made of the same to the facts of this case by the Court. The appellant association was not seeking to recover anything on any contract of any kind, whether made in violation of the laws of the State of Mississippi, its public policy or otherwise, but was seeking to defend an effort to recover from it by the defendant in error upon the suit instituted by him against said association.

There is not a syllable of proof in the record in this cause that the appellant association had done or committed any act in the State of Mississippi contrary to the laws of that State, and the only way we can account for the effort of the Supreme Court of the State to apply Section 849 of the Code of 1892 to the instant case is found in the curious but manifest error into which the Court fell in supposing that the Shannon case, previously decided by the Court, was a controversy between Shannon and the appellant association, and applying the facts in the Shannon case to the instant case, when, as a matter of fact, the Shannon case involved a controversy between Shannon and the Georgia

State Building and Loan Association, and not the appellant association at all.

In the opinion in the instant case, Chief Justice Whitfield says "We desire in passing upon the merits of the case to say, for the satisfaction of learned counsel for appellant, that we have both in this case and in the case of *Shannon v. this same appellant,* and Wilson v. this same appellant, both reported in 78 Miss., carefully considered the opinion of Judge Hammond in 88 Fed. Rep., p. 7, and Judge McKenna in Bedford v. Eastern B. & L. Association" (Transcript, p. 106).

Turning to the Shannon case, reported in 78 Miss., on page 955, we see that "This was an action by the appellant, Chas. R. Shannon, for the recovery of usurious interest paid to the appellee, *the Georgia State Building and Loan Association*, and was begun by attachment against the defendant as a non-resident."

It will thus manifestly appear that the Supreme Court of Mississippi, in the instant case, was laboring under the impression that the Shannon case and the instant case involved a controversy with the same foreign building and loan association, and, laboring under this erroneous impression, the Supreme Court of Mississippi sought to apply in the instant case a statute of that state pertinent to the facts in the Shannon case, but not pertinent to the instant case.

The facts in these two cases, as disclosed by the reports thereof, are as distinct and separate as the associations themselves. In the opinion in the instant case, the Court, relying upon the Shannon case, and erroneously supposing that the same facts applied in the present case, and applying the Shannon case to this case as a precedent, used the following language: "We put the decision in Shannon's case as follows: 'The chief point of contention is, whether this is a Georgia or a Mississippi contract.

It is true the notes were payable in Georgia, but the mortgage was on land in Mississippi, and the debtor lived in Mississippi, where alone the mortgage could have been enforced. *All the payments made through a series of years were actually made in Mississippi instead of Georgia to the local treasurer here.* This foreign corporation had the power to organize local boards throughout Georgia and other states. *It did organize a local board, thoroughly officered at Ellisville in this State.* It is obvious that this foreign corporation has thus *localized* its Mississippi business within the State of Mississippi." * * * "The contract is a Mississippi contract according to the *real facts and the real intention of the parties.* Courts look through all disguises to the real case made by the actual facts (Transcript, p. 108)."

There is not a hint in this record that the appellant association ever organized *a local board at Ellisville or anywhere else in the State of Mississippi*, and, as a matter of fact, instead of "all the payments through a series of years" being made in Mississippi to the local treasurer here, the larger portion of each of the loans made to the defendant in error was re-paid in New York (Transcript, Ans. 26, p. 50).

The reference to the Act of 1890, page 10, and the effort to apply the same to the instant case, must have grown out of the same misconception which led to the reference to Section 849 of the Code of 1892. The Act of 890 is found in Chapter 2, and is styled "An Act to amend the Revenue Laws" and its whole purpose and scope is to provide for revenue. On page 10 of said Act, we find that "Each building and loan association incorporated by any foreign country or other state of the Union * * * which shall *establish agencies or branches* within the state, shall be liable to a separate tax on *each branch office or agency*, and

each of said agencies or places of doing business or collecting dues shall be considered *for the purpose of taxation* as a separate and distinct building and loan association and shall pay the tax required of the building and loan association by the act to which this is an amendment."

As there was no branch office or agency established by the appellant association in this state, so far as the record discloses, there is no room for the application of this statute to the instant case.

It is true that the record discloses the fact that the appellant association had an agent in the city of Meridian, with limited duties and powers, but there is no statute in the State of Mississippi taxing *agents* of foreign building and loan associations, or in the remotest way referring to *agents* of foreign building and loan associations and prescribing what they may or may not do in that state. There is a vast distinction between an "agency" or "branch office" and an agent, and this distinction is thoroughly recognized in the revenue laws to which the Act of 1890 is an amendment, and of which it forms a part.

Section 3382 of the Code of 892 of the revenue laws of that state, providing for privilege taxes, to which the Act of 890 is an amendment, provides that the following privileges, among others, shall be paid: "On *each agency* for sewing machines—$50.00: On *each agent* for sewing machines of each company—$10.00."

We think that it is perfectly manifest that the statutes above referred to have no sort of place in the proper construction of the contracts in question, even if the same had been entered into subsequent to their enactment, and that, as construed by the Supreme Court of the state in the instant case, and those referred to as authority for the conclusions reached therein, they violate the constitutional guarantees upon which

appellant relies; but, if mistaken in this, certainly no act of the legislature of the State of Mississippi passed subsequent to the time when the defendant in error became a member of the appellant association can effect the rights of the parties hereto. Let it be remembered that every essential act and fact connected with the transaction between the parties hereto took place and culminated in the City of New York. The appellee's application for membership was not a matter of right to be granted simply for the asking, and when his application was mailed in the City of Meridian he did not, by this act, become a member of the association, but it was the acceptance of his application by the officers of the association at the City of New York and the issuance of his stock which made him a member of the association.

Under provisions of the Articles of Association and the rule announced in the Bedford case, he then became entitled to demand an advance upon his shares of the stock upon the conditions named and provided by said association. This, as we have already seen, was a vested right of which he could not be deprived, and the moment the advance was made the association became vested with the correlative right to receive payment of the same upon the terms upon which it was made. In pursuance of the right which defendant in error had under his contract, he subsequently made a settlement of each of the advances made to him by the appellant association. Each settlement was made voluntarily and before the stock in either case had matured. At the time of the settlement Brahan was given credit, in the withdrawal value of his shares, for the premiums, interest and dues paid prior thereto to the Agent of the Association at Meridian, Mississippi, which was but an insignificant part of each loan. The

larger portion of each advance was repaid in New York Exchange sent directly to the Appellant Association by Braham from Meridian, Mississippi.

Referring to the payment of the second loan, which was the same as that of the first, the witness Gibson in answer to Interrogatory 36, says:

"The second loan was re-paid at the office of the Association in the City of New York, on or about March 10, 1897, by applying the withdrawal value of twenty shares held by said Brahan, in part payment, and by applying the proceeds of the draft drawn by the First National Bank of Meridian, on the National Park Bank, of New York, amounting to $1,473.93, and the amount of which draft was paid by the said bank to said Association at the City of New York. This re-payment was made strictly in accordance with the Articles of the Association and under the terms of the contract contained in the Bond and Mortgage and assignment of shares executed by Brahan, and on this re-payment of the loan the said Brahan received the proportionate share of the alleged usurious profits, to which he was entitled under the Articles of the Association by having the same, then amounting to $70.70, applied in making up the withdrawal value of his twenty shares, which value was then applied in part payment of the loan" (Transcript, 56).

Under the contract between the parties, as shown by the record, it was the maturity of Brahan's shares of stock in the appellant association which was to work the payment or cancellation of his indebtedness thereto, and for the payment of the same the stock was required to be surrendered to the association. In neither of the cases was anything like a sufficient sum paid to the agent of the Association at Meridian, Mississippi, to approximate the maturity of the shares; so that, as a

matter of fact, it was the application of the proceeds in New York Exchange at New York, added to the application of the withdrawal value of the shares at New York, to the payment of the advance or indebtedness in each case which finally worked out the settlement between the parties hereto. Upon the settlement thus made all the relations between the parties hereto immediately ceased and the money thus paid became the property of the appellant association. In accepting the same it exercised a right which it had under contract between the parties, and it cannot now be deprived thereof without impairing the obligation of its contract with the defendant in error, depriving it of its liberty to contract and its property without due process of law, and also of the equal protection of the law, guaranteed by the Constitution of the United States.

This brings us to the consideration of the Pinkston case referred to in the opinion of the Supreme Court of Mississippi, as controlling the instant case upon cross appeal. In reference thereto the Supreme Court of Mississippi in its opinion says:

"On the cross appeal as to the loan made under the Act of 1886, the case of this same appellant vs. Pinkston, controls, 79 Miss. The judgment on the cross appeal is therefore reversed and the case as to that loan remanded to be proceeded with in accordance with the opinion this day delivered in the National Mutual Building & Loan Association vs. Pinkston (Transcript 237)."

Turning to the Pinkston case, it will be seen that that case turned upon the construction of the Act of 1886, hereinbefore cited in full. It will further be seen that though there is not a hint in the statute, which distinguishes domestic from foreign Building and Loan Associations, and though the Supreme Court of Mississippi in the case of Sullivan v. B. & L. Assn., had treated the

statute as applying alike to foreign and domestic associations, yet a divided Court in the Pinkston case held that the statute applied only to domestic Building and Loan Associations. It is needless for us to suggest that this new construction of the statute, as applied to the contracts in question, which were made long prior to the decision in the Pinkston case, is within the prohibition of the contract clause of the Constitution of the United States.

In this connection, we beg leave to call the attention of the Court to the fact that the opinion delivered by Judge Woods in the case of Sullivan vs. Building and Loan Association, was not as much as referred to. We further call the Court's attention to the dissenting opinion delivered by Calhoun, Justice, in the Pinkston case, construing the Act of 1886:

"The question now for answer is, whether non-resident building and loan associations are included or excluded from the exceptions made by Sec. 1. My view is * * * that such associations are included in the exception. It is incontrovertible that, if we had to deal only with the title of the Act and Sec. 1 of the Act, all building and loan associations would be included, because then it would be a general Act pure and simple, applying to all persons and corporations, whether foreign or domestic expressly excepted in such associations. There would be no difference of opinion as to this, because in that case the scope would be too plain to require interpretation."

After commenting upon the views of the majority of the Court further on in the opinion, Judge Calhoun says:

"Five days after this Act was passed in a general statute, the same Legislature imposed a privilege tax on Building & Loan Associations" (Laws, 1886,

p. 20). "This applies to foreign as well as domestic corporations, of course. How then can we limit the other Act. *It hardly comports with the magnanimity to be ascribed to the Legislature to suppose that it meant to dig a pitfall to entrap the foreign companies into pouring their money into Mississippi to their own ruin. When our Legislature meant to confine itself to domestic associations it distinctly said so, as in Sec. 2348 of the Code of 1892, and this is a pregnant fact in the construction of the Act in hand.*"

The Court will see that the Pinkston case is a complete departure from the principles announced in the Sullivan case, and in such cases, the true rule is, to give to the change of judicial construction or opinion in respect to a certain class of contracts the same effect, as to its operation on then existing contracts, that would be given to a legislative amendment; that is to say, to make it prospective but not retroactive (Douglas vs. County of Pike, 101 U. S., 677). The failure to do this, and the effort on the part of the Supreme Court of the State of Mississippi, to apply this new construction of the statutes of Mississippi, announced in the Pinkston case, to the contract in question, which antedated the decision, falls within the prohibition of the contract clause of the Constitution of the United States and results in depriving the Appellant Association of its property without due process of law and denies to it the equal protection of the laws.

> "*Any attempt by the Courts of Mississippi to so apply the statutes of that State to the contract in question under the facts as here disclosed, as to hold that such contract is usurious under the Mississippi statute, is an attempt to evade that provision of the 14th amendment to the U. S. Constitution, which grants to the parties liberty of contract.*"

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The Judgment of the Supreme Court of Mississippi should be reversed.

Having, as we insist, shown that the federal questions involved in the case were properly presented in due time; that they were necessarily involved in the decision of the Supreme Court of Mississippi and were decided adversely to the plaintiff in error; that there was no independent ground sufficiently broad upon which the decision could be rested; that the Federal questions raised were meritorious and controlling, we now desire briefly, to refer to the facts of the case in order to show the absolute want of merit in the suit of the defendant in error, and that the judgment of the Supreme Court of the State of Mississippi should be reversed.

It will be seen by reference to the decision in the instant case, and all of the cases referred to in it, as controlling, that the whole controversy turned in the opinion of the Supreme Court of Mississippi upon the situs of the contract. The Supreme Court referring thereto, uses the following language:

"The contract is a Mississippi contract according to the real facts and real intention of the parties. Courts look through all disguises to the real case made by the actual facts" (Transcript, 108).

"When all there is in a case like this to show that the intention was to perform the contract in a foreign State is a mere specious paper recital in the notes, and over against this, and contrary to this, are all the other facts in the case, and the whole course of dealing between the parties, it would be an abdication of common sense on the part of any Court to find the real intention of the parties in the paper recital instead of in the real facts of the case."

The foregoing is quoted by the Court from the Shannon case, but it is adopted in the instant case

and made the basis of the opinion of the Court as hereinbefore explained, under a mistaken conception of the facts. Looking first to the paper recitals in this case, we find, as hereinbefore indicated, that it is unquestionably a New York contract. Looking to the provisions of the paper recitals alone, there could be no controversy on that proposition. The only ground upon which the decision of the Supreme Court of Mississippi could justly be raised, would be that these paper recitals were fraudulent in fact and not intended to convey the real intent of the parties to the contract. Over against this we beg to submit the following suggestions: This Association was organized in the City of New York and expected to do business, and did do business in a number of States. The most natural thing possible, from a business point of view, would have been a requirement that all of its contracts should be made payable in the same State, in order that there might be harmony and uniformity of construction of its contracts, and that the funds of the Association might be gathered together under the immediate control of the officers of the Association domiciled in New York.

The testimony in the case shows that from the outset all of the contracts were made payable in New York, long before any advances were made to members in the State of Mississippi. The contracts of the Association are shown to be uniform, regardless of the State in which advances are made to members, and all this had become a custom and a rule of doing business before the State of Mississippi was thought of in connection with the business of Association. As a matter of fact, at the time these contracts were made, as hereinbefore shown, the State of Mississippi was classed by all of the authorities on Building & Loan Associations as among the States where the Building and Loan con-

tract would be enforced according to the terms thereof, so that there could not have been any possible reason for resorting to any subterfuge in reference to contracts between members of the Association in the State of Mississippi. Not only is that true but the record in this case shows that F. V. Brahan was a practicing lawyer, and we may add, a lawyer of ability, as will appear by declaration filed in the case prepared by himself and signed "F. V. Brahan, *per se*." Not only is this true, but the whole course of dealings between the parties shows that Brahan thoroughly understood the contract, and neither desired nor needed any one to look after his interest in the matter. His letter to the Association, written in 1893, found on page 78 of the Transcript shows that he voluntarily settled the first loan with the Association with the full understanding of all the facts and in strict accordance with the written terms thereof. This letter also shows his purpose to borrow again on the same shares of stock on the same terms, and as a matter of fact, he did procure another advance on the same shares of stock (except five, which he had withdrawn in the mean time) upon precisely the same terms, upon which he had secured the first advance, and this loan was likewise voluntarily settled by him in strict accordance with the terms of the written contract, and that with the full knowledge of all his rights and obligations in the premises. It is perfectly safe to say that it never would have occurred to Brahan in all the tide of time that his contract was anything, more or less, than it purported on its face to be, but for the decision by the Supreme Court of Mississippi in the Sokoloski case and other cases following that, from which, in the language of the opinion in Shields v. Association, "he obtained subsequent enlightenment of law, as he now supposes."

In the case of Luther Manship, *et al.* v. New South B. & L. Assn., herein before referred to, it was insisted, as it is here, that the contract in that case was a Mississippi and not a Louisiana contract. Referring to this contention, Judge Miles, delivering the opiniou of the Court, said:

"I now come to the consideration of whether the contract between the parties hereto is a Louisiana or a Mississippi contract. I think it clear that the contract is solvable in Louisiana, and it is to be governed by the laws in Louisiana. It is true that it is alleged in the bill in this cause that the contract was made payable in Louisiana for the fraudulent purpose of evading usury laws of the State of Mississippi, but this allegation is specifically denied, and not only does the proof fail to sustain it, but all the circumstances surrounding the transaction seem to me to reach the opposite conclusion. This building association was organized in Louisiana, and its principal place of business was New Orleans, Louisiana. It contemplated doing business in several States, in which the rates of interest vary in amount. The promoters of the organization and the officers of the same all lived in the State of Louisiana, and it was just as natural, as it was prudent, for Louisiana to be selected as the place where such contracts were to be paid. It would have been remarkable, and something out of the ordinary course of business affairs, if some one place of payment had not been fixed, and if that one place had been fixed elsewhere than where the home office was located and officers of the association resided. Sec. 5 of Article 3 of the by-laws of said association provides that 'all money due from members to the association or from it to the members shall be payable at the home office in New Orleans, La.'"

"The note given by Belmont P. Manship and Luther Manship on its face shows that it was pay-

able to the defendant association 'at their office in the City of New Orleans, La.' The deed of Trust given to secure the same recites the fact that said note is payable to the order of said New South Building and Loan Association at their office in the City of New Orleans, La. The subscription to stock signed by Belmont P. Manship provides that 'agents are not allowed to collect admission fees; same must be forwarded to the home office direct by the applicant, all other payments to be made to the home office.' "

"It is true that it was provided by Sec. 4, Article 8 of the by-laws of said association, that 'members may, if they so desire, make monthly payments on stock to the local treasurer, but such local treasurer shall be deemed to be the agent of the members and not of the association.' It is further true that the evidence in this case shows that all payments made on this debt were made at Jackson, Mississippi, to parties selected by the defendant association to collect and remit the same. I am unable to see how this proves that the contract is a Mississippi contract.

"To put themselves in an attitude to do business in competition with local building and loan associations, it was necessary to make some arrangement for collections and remittances, and the local arrangement so made was the simple outgrowth of the situation, and does not conflict with the general provisions of the contract that the same should be solvable in the State of Louisiana. There can be no doubt that the contract between the parties hereto would be enforced as written in the State of Louisiana (See American Homestead Company vs. Linigan, 46 La. An.; 15 Southern Rep., 370; 21 Southern Rep., 643). I believe it is admitted that the contract between the parties hereto would be enforced in Louisiana, and it being in my judgment, a Louisiana contract, it should be enforced elswhere.

"It is urged upon the Court that the Supreme Court of Mississippi is committed to the doctrine that contracts similar to this are Mississippi contracts, and that this Court should follow that Court. The case of Sokoloski vs. New South Building and L. Association is cited, and this Court is urged to follow the same. The question, in my judgment, is one of general jurisprudence and commercial law, in respect to which the decision of the State Court, however much it may be respected, is not binding upon this Court, and cannot be followed when this Court, in the exercise of an independent judgment, reaches a different conclusion.

"The contention that Federal Courts should follow State Courts generally grows out of the provisions of the judiciary act found in Revised Statutes of the United States, Sec. 721, which provides that: 'The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States in cases where they apply.'

"In Swift vs. Tyson, in 1842, the question involved was whether a pre-existing debt constituted such a valuable consideration as to make a transferee of commercial paper a holder for value. The Federal Court disregarded the decision of the Courts of last resort in the State of New York, in which the contract was made and became payable. Justice Story, in delivering the opinion of the Court, used the following language: 'In the ordinary use of language, it will hardly be contended that the decisions of the Courts constitute laws. The laws of a state are usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long established local customs having the force of laws. And we have not the slightest difficulty in holding that this

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section upon its true intendment and construction is strictly limited to local statutes and local usages of the character before stated, and does not extend to *contracts* and *other instruments of a commercial nature*, the true interpretation and effect whereof are to be sought not in the decisions of local tribunals, but in the general principles and doctrines of commercial jurisprudence." See also Oates vs. First National Bank, 110 United States, 239; Hudson R. Co. vs. Hading, 30 Fed. R., 513; Watson vs. Tarpley, 16th Howard, 57; Brooklyn City R. R. vs. National Bank, 102 U. S., 14; Bank of Edgefield vs. Farmers' Co. Op., 52 Fed., 98; 8th Wallace, 575.

The law of the place of performance of a contract is purely a commercial question, and the federal Courts have disregarded the State Courts on that question in the following cases: Hartford Fire Insurance Co. vs. C. M. & St. P. R. W., 70 Fed. R,. 20; 94 Fed. Rep., 575, referred to hereafter in this opinion; Brewer vs. The Association, 86 Fed. Rep., 784, and Building and Loan Association of Dakota vs. Logan, 14 C. C. A., 133.

I don't think it can be contended that the ruling of the Supreme Court of this state (Mississippi) in the Sokoloski case that a fixed premium rendered the contract usurious, or in the Shannon case, that the contract in that case was a Mississippi contract, are founded upon any "rules or enactments promulgated by the legislative authority of the state" or upon "long established local customs having the force of laws."

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DEFENDANT'S

BRIEF

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 348.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK,
Plaintiff in Error,
vs.
FRANK V. BRAHAN.

In Error to the Supreme Court of the State of Mississippi.

BRIEF FOR DEFENDANT IN ERROR.

Howard Mayer,
Of Counsel for Defendant in Error.

The Tucker Printing House, Jackson.

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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 158.

THE NATIONAL MUTUAL BUILDING & LOAN ASSOCIATION, OF NEW YORK, PLAINTIFF IN ERROR,

VS.

FRANK V. BRAHAN, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This writ of error presents for review the final judgment of the Supreme Court of Mississippi (Record, page 103), which affirmed a judgment in favor of the Defendant in Error, Frank V. Brahan, against the plaintiff in Error, the National Mutual Building & Loan Association of New York.

Defendant in error brought his suit by attachment in the circuit, or common law court of Lauderdale County, Mississippi, against the plaintiff in error, for the pur-

pose of recovering interest alleged to be usurious which he had paid on two mortgage loans, one made in May, 1892, and the other made in August, 1894.

Such payments so made by him were recoverable according to the law of the State of Mississippi, being Section 2348 of the Code of 1892, which is as follows:

> "2348. LEGAL RATE—The legal rate of interest on all notes, accounts and contracts shall be six per centum per annum; but contracts may be made in writing for the payment of a rate of interest as great as ten per centum per annum. And if a greater rate of interest than ten per centum shall be stipulated for, or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

The claim of defendant in error was, and is, that the plaintiff in error had exacted from him interest in excess of ten per centum per annum, disguising and concealing a part of the same under the name of premiums; that the so-called premiums exacted were not bona fide premiums but were of such nature as to be in fact no other than interest.

This suit was brought after, and in pursuance of the decision of the Supreme Court of Mississippi in the case of *Sokoloski v. New South Building & Loan Association*, 77 Miss., 155, which was decided at the March term, 1899.

In order that the case may be more easily understood, it will be well to state here the legislative and judicial history in Mississippi of this question.

Since the year 1822 the Statutes of Mississippi have prohibited the contracting for more than ten per cent. per annum interest. (Hutchinson's Mississippi Code, p. 641; Code of 1857, p , 370; Code of 1871, Sec. 2279; Code of 1880, Sec. 1141; Code 1892, Sec. 2348).

Since the year 1847 it has been the settled law in Mississippi by judicial declaration of the effect of those stat-

utes, that even after usurious interest has been paid the excess over six per cent. could be recovered by action at law. (*Bond v. Jones*, 8 S. and M. 368; *Dickerson v. Thomas*, 67 Miss., 777.

Section 1042 of the Code of 1880, being also Section 849 of the Code of 1892, is as follows:

> "1042. Corporations which exist by the laws of any other state of the Union, may sue in this State by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against. And the acts of the agents of any such foreign corporation, shall have the same force and validity, as the acts of agents of private persons, within the scope of their authority; but such foreign corporations shall not, by their agents or otherwise, do or commit any act in this state contrary to the laws or policy thereof, and shall not be allowed to recover, on any contract made in this State, or on any cause of action originating therein, which is in violation of law or public policy."

Chapter XIII, of the Mississippi Session Laws of 1886 (See Laws, p. 35), is as follows:

> SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That hereafter no person, bank, corporation or association of persons except Building and Loan Associations, shall demand or stipulate for a greater rate of interest than ten per cent. per annum, for any money advanced or loaned, or any note, account, or other evidence of debt.
>
> "SEC. 2. *Be it further enacted*, That every provision of any Act heretofore passed, creating any corporation or amending any Act creating any corporation, which authorizes any such corporation to take or receive more than ten per centum interest per annum, or which is in conflict with Section 1141, of the Code of 1880, is hereby repealed."

It was decided in *Building & Loan Association v. Pinkston*, 79 Miss., p. 468, that this statute was not amendatory of the previously existing interest laws, but was a repealing act; and that the exception in Section 1 by which build-

ing and loan associations were allowed to take more than ten per cent. applied only to those associations which had *previously* been incorporated *by this State*, and did not authorize foreign associations, "deriving all their powers and privileges from the laws of other states, as interpretated by the courts of such states," to make such exorbitant contracts in this State.

That construction of this statute is conclusive here:

Tullis v. Railroad Co., 175 U. S., 348.

Cargill v. Railroad Co., 180 U. S., 452.

Under such state of the law the plaintiff in error having been incorporated in New York in 1888(Record, pp. 8, 9), established an agency in the City of Meridian, Miss., some time before May 1892, (Record pp 7, 9). The exact nature of this agency, and the extent of the agent's power, were amongst the controverted questions in the instant case, and were decided adversely to plaintiff in error on the evidence.

At the March Term, 1899, the Supreme Court of Mississippi decided the *Sokoloski* case mentioned above (77 Miss., 155), and *held:* That a true "premium" in a building and loan contract was "one gross sum" (deducted or paid), "in consequence of open bidding for the advancement;" that the exaction by private and non-competitive contract of a fixed six per cent. as interest, and a second fixed six per cent. as so-called premium, was only a cover for an usurious twelve per cent., and was "opposed to our public policy, and usurious and void," meaning that the entire contract for interest was void; that while the Mississippi Statutes allowed a domestic association, chartered in that state, to exceed the legal rate of interest, such privilege was not accorded to a foreign association, and comity did not require that it should be, since the matter is one of the State's own public policy.

This case was the first in Mississippi in which those questions had been raised and decided. It was quickly, however, followed by several others: *Crofton v. B. & L. Association*, 77 Miss., 166, decided the same day; *Association*

v. Tony, 78 Miss., 916, decided at the March term, 1901; *Association v. Shannon*, 78 Miss., 955, same term; *Association v. Wilson*, 78 Miss., 995, same term; *Association v. Pinkston*, 79 Miss., 468, at October term, 1901; *Association v. Farnham*, 81 Miss.. 364, at October term, 1902.

In the *Shannon* and *Wilson* cases it was decided that where a foreign association carries on its business in Mississippi through local agents or through local boards, and the notes are made in that state, secured by mortgages on lands of the borrower located in that state, and the borrower, a resident of that state, has through a series of years made all payments to an agent or a board established in this State, it was a localization by the association of its business in Mississippi; and where the real intention of the parties as disclosed by what they actually did, was so to localize the business there, the contract was subject to the usury laws of Mississippi, although the writing contains a provision for payment in another state having dissimilar laws.

Defendant in error brought this suit to recover the usurious interest paid by him, in July, 1899, after the decision of the *Sokoloski* and the *Crofton* cases.

In defense, the plaintiff in error availed itself of the practice act of Mississippi, being Section 886 of the Mississippi Code of 1892, which is as follows:

> "686. Notice of special matter under the general issue: If the defendant desire to prove under the general issue in any action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to, or filed with the plea; otherwise such matter shall not be allowed to be proved at the trial; and the defendant may in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause file a written notice to the defendant of any special matter which he intends

to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible on the trial."

In *Tittle v. Bond*, 53 Miss., 578, it had been decided that this statute narrowed the scope and effect of the general issue, that every defense not merely consisting of a denial of the allegations of the declaration, must be pleaded specially or notice thereof must be given under the general issue.

So conducting its defensive pleading, the plaintiff in error filed its general issue and appended thereto a most elaborate and lengthy notice of the affirmative matters on which it intended to rely. (See Record, pages 7 to 14).

The attention of this court is called to the fact that in such notice the plaintiff in error undertook to prove amongst other things, (1) that the contract between it and the defendant in error was a New York contract; and (2) that by the laws of New York it was a valid and enforcible contract; and, also, (3) that its contracts were not put into the form which they bore in order to evade the usury laws of Mississippi.

The issues were made up on September 27th, 1899. Afterwards, without having first obtained leave of the court, plaintiff in error filed on April 20th, 1901, being some eighteen months after the cause was at issue, an amended notice, being a wholly different notice, under its plea of general issue; and, later, on August 6th, 1901, again without having obtained leave to do so, it filed an amendment to its plea, and an amended notice, wholly different from the first notice, being nearly two years after the cause had been put at issue and ready for trial. (See Record, pp. 14 to 17.)

At the following term of the court, the defendant in error moved to strike out those amendments because filed too late, and without leave of the court.

Plaintiff in error made a counter motion for permission to file the notice, appearently *ore tenus*. The court refused leave to file, and struck out the notice already filed without leave (Record p. 18.)

Thereupon the case was tried on voluminous evidence before a jury, and the result was that the jury, after hearing the evidence, returned a verdict in favor of the defendant in error for the amount paid by him in excess of the principal loan made in June, 1894, with interest aggregating $771.75. (Record p. 98.)

The failure of the jury to find in favor of the defendant in error for the usurious interest paid on the loan of 1892 arose from the fact that the trial court instructed the jury that the contract of May, 1892, was not usurious, and that plaintiff was not entitled to recover the interest paid thereon. (Record, p. 94.)

After the usual motion for a new trial, the plaintiff in error prayed an appeal to the Supreme Court of Mississippi from the judgment against it for $771.74 aforesaid. (Record pp. 98 and 99.)

On the 7th day of April, 1902, the judgment of the trial court was affirmed (Record pp. 103 and 104), and from such judgment of affirmance, this writ of error was prayed.

The opinion of the court is found in the record, pages 104 to 116. The case itself is reported in 80 Miss., p. 407.

The first, second, third, fourth and sixth assignments of error present a claim that the judgment complained of violated the first Section of the Fourteenth Amendment by depriving the plaintiff in error and its shareholders of their property without due process of law.

The claim is put in several ways: (1), That the judgment deprived a New York corporation of its liberty to contract and of its property; (2) that it deprived a New York corporation of its liberty to make a contract in the State of New York with its shareholder residing in Mississippi, said contract being valid under the laws of New York and performable in that State; (3) that it deprived a New York corporation of its liberty to advance money to

its shareholder residing in Mississippi and of its liberty to contract with its shareholder in New York to repay said money in New York; (4) that it deprived a New York corporation of its money and property advanced to one of its shareholders and due appellant under a contract performable in New York and valid and enforceable under the laws of that State; and (5) that it deprived appellant's shareholder of his liberty to make a contract performable in New York, to the injury of appellant.

The fifth assignment of error affirms that the judgment complained of denies to the appellant the equal protection of the laws.

The seventh assignment affirms that by the rendition of the judgment complained of, full faith and credit were not given to the public acts, records and judicial proceedings of New York, under which plaintiff had been incorporated, and by which its contracts had been upheld.

The eighth and ninth assignments of error affirm that by the rendition of the judgment complained of the declaration of public policy first announced in the Sokoloski case is applied to a contract long previously made; which is tantamount to judicial legislation, and is in effect, the passage of a law *ex post facto*, and also impairs the obligation of the contract of plaintiff in error.

Brief in Behalf of Defendant in Error.

The assignments of error in this case fall legally into two classes: First, those assignments which invoke the protection of the Fourteenth Amendment, and those which invoke Section 1 of Article IV of the Constitution of the United States; and, secondly, those which invoke Section 10 of Article 1.

The former class embraces assignments numbered one, two, three, four, five, six and seven; and they fall within the rule under Section 709 of the Revised Statutes which required them to be specially set up and claimed in the State Courts.

Chapin v. Fye, 179 U. S., 127.
Johnson v. New York Life, 187 U. S., 491.

The latter class embraces assignments numbered eight and nine, and they do not fall within the rule which requires them to be specially set up, but can be considered by this Court if they were necessarily involved in the litigation in the State court.

Railroad Company v. Adams, 180 U. S., 1.

So far as the former class of assignments is concerned, being all except the eighth and ninth, this Court cannot consider the Federal questions sought to be raised by this appeal, because they were not raised in time and in the proper way. What the Supreme Court of Mississippi did was nothing more than to decline to pass on the alleged Federal questions because those questions had not been raised in the trial court, as required by the state practice.

Of course it follows that the same reason applies to the action of the trial court. As shown in the statement, these Federal questions were sought to be raised in the trial court by a so-called amended notice filed eighteen months after the cause was at issue and ready for trial, which was afterwards stricken out for that reason only by the trial court. This was a mere question of state practice; and when the Supreme Court of the State refused to consider the Federal questions for that reason, as it did (Record pp. 115–116), and for that reason alone, its decision is not reviewable here.

Kipley v. Illinois, 170 U. S., 182.

Railroad Co. v. Purdy, 185 U. S., 148.

Laten v. Missouri, 187 U. S., 356.

Johnson v. New York, 187 U. S., 491.

SECOND POINT—The eigth and ninth assignments of error invoke Section 10, Article 1 of the Federal constitution, and also apparently the prohibition of Section 9, Article 1 against the passage of *ex post facto* laws.

Those sections have no application. The complaint here is not of the enforcement of any state statute enacted subsequently to the making of the contract. The judgment complained of was for the recovery of interest paid on a contract made in 1894, while the statute enforced was

a section of the Mississippi Code of 1892. Indeed the very language of the assignments is a complaint of the rendition of the judgment, and not of the enforcement of a subsequent statute. That these provisions apply to statutes only and not to judgments is settled law.

New Orleans, etc., Co. v. Louisiana, etc., Co., 125 U. S., 18.
Railroad Co. v. Plainview, 143 U. S., 371.
Bacon v. Texas, 163 U. S., 207.
Railroad Co. v. Adams, 180 U. S., 41.
New Orleans Co. v. Louisiana Co., 185 U. S., 336.

The same course of reasoning which determined that Section 10, Article 1 related only to statutes and not to adjudications, leads to the same conclusion as to the prohibition of the passage of *ex post facto* laws. There must be a retrospective statute. The judgment of the Court must apply to a transaction innocent when done a criminal or a penal statute subsequently enacted.

Kring v. Missouri, 107 U. S., 221.
Pierce v. Carskadon, 16 Wall, 234.
Burgess v. Salmon, 97 U. S., 385.
Dent v. West Va., 129 U. S., 114.

It would never do to hold that a statute is *ex post facto* or that a judgment of a court is "tantamount to an *ex post facto* law," because an act in fact violative of an existing law may have been erroneously supposed by the perpetrator to be lawful when and as he did it; for that would be to bring a statute or judgment to the test, not of the law as it is, but of the law as it was by each particular actor supposed to be.

THIRD POINT—In respect, now, to all of the assignments: This Court will not undertake to review the decision of the State Court, because so to do would be to review adjudications made on pure questions of fact.

By analyzing the pleading of the plaintiff in error in the Court below (Record pp 7-14), it will be seen that the controlling questions of fact on which the case was disposed of, were these: (1) an averment and an undertaking to prove that the plaintiff in error was a building and

loan association domiciled in New York which never had any branch office in the City of Meridian, and never had there any agent authorized to grant or make loans; (2) that the contract between the parties was a New York contract, performable and solvable in that state, and was not a Mississippi contract; (3) that the contract was not put in the shape in which it was put in order to evade the usury laws of the State of Mississippi.

The foregoing questions were all heard by the trial court on much evidence produced by both parties to the cause; and that Court decided adversely to plaintiff in error as to the contract of 1894 (on which this writ of error is based); and the Supreme Court affirmed that finding and the consequent judgment.

The foregoing were questions of fact, and they were duly adjudged adversely to the plaintiff in error both in the trial court and in the Supreme Court of the State. The Court determined judicially and regularly, in effect, that the plaintiff in error had located its business in Meridian notwithstanding the statements in its written contract, because

1. It had an agent there authorized to make loans, and he made the loan in question; and

2. The contract, as a fact, was not performable and solvable in New York, but was in Mississippi; and

3. It was put into its ostensible shape in order to evade the usury laws of Mississippi.

In brief, the decision was that the contract was in fact a Mississippi contract disguised as a New York contract in order to evade the usury laws of Mississippi and defeat its public policy.

The underlying questions mooted and decided were, not whether the plaintiff in error had a contract, but the fact whether the locus of that contract was in Mississippi or New York; not whether a New York corporation and its Mississippi stockholders had a right to contract in New York, but whether they had not in fact contracted in Mississippi.

It is settled law in this court that it will not undertake to review the decision of a state court on a bare question of fact, even although had that question been determined differently to what it was, and the judgment of the state court had then gone against the plaintiff in error, he would then have been entitled to his writ here.

Dower v. Richards, 151 U. S., 658
Egan v. Hart, 165 U. S., 188.
Railroad Co. v. Chicago, 166 U. S. 226.
Hendrick v. Railroad Co., 167 U. S., 673.
Turner v. State, 168 U. S., 90.
Gardner v. Banestell, 180 U. S., 362.
Western Union v. McCall Pub. Co., 181 U. S. 92.
Bement v. Harrow Co., 186 U. S., 70.

Nor will this court review the decision of a state court upon the ground that the finding was against the evidence or the weight of the evidence.

Thayer v. Spratt, 189 U. S., 346.

There was still another controlling question of fact which was put in issue in the court below and determined adversely to plaintiff in error, and that was an issue as to what was the law of the State of New York (Record p. 9). In the trial of a case in Mississippi, a question of that sort remains, and is, a question of fact, and however it may be determined in the state court, whether correctly or wrongly, this court will not review it for that reason.

Building & Loan Association v. Ebaugh, 185 U. S. 114.

This rule is not changed by the fact that there is a Mississippi Statute, being Section 939 of the Code of 1892, which provides that "When any question shall arise as to the law of the United States or of any other state or territory of the United States or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this state."

This provision does not change the essential nature of the question; it still remains a question of fact. The effect

of the provision is only to dispense with the necessity of taking depositions to prove the law, or producing certified copies of the statutes. It is a mere provision of evidence. In respect to that matter, it requires the Mississippi courts to take judicial knowledge of the fact under consideration exactly as under the general rules of evidence all courts are required to take judicial knowledge of many facts commonly known or of *quasi* public nature.

However, this point is merely cumulative; and if this court should hold that the effect of section 939 is to exclude the rule expounded in the *Ebaugh* case, there still remains the insuperable difficulty to plaintiff in error that three leading propositions of fact mentioned above, all of which were adversely determined to it, are beyond the power of this court to review; and those determinations of fact go to the very root of its claim to the benefit of a New York contract. All of the assignments of error postulate the existence of a New York contract; but in fact there was none.

The case of *Algeyer v. Louisiana,* 165 U. S., 578 does not in any wise conflict with the foregoing argument. The Insurance Company in that case had not appointed any agent in Louisiana and had not complied with the law regulating the doing of business by foreign corporations; and Mr. Justice Peckham, in the opinion, repeatedly and plainly insists on the fact that the contract was actually made in New York (which fact was expressly admitted in the brief of counsel). The decision was plainly put on the ground that what was done in Louisiana was no more than to mail a notice, which was due to be given under a *pre-existing contract* "which it is conceded was made outside and beyond the limits of the jurisdiction of the State of Louisiana." In the instant case, the very question put in issue by plaintiff in error itself, and judicially determined against it by due and regular trial in a court of competent jurisdiction, was whether the contract was in fact made in New York or in Mississippi.

The instant case falls within the principle of *Hooper v. California,* 155 U. S., which was expressly reaffirmed in the *Algeyer* case.

See, also, *Noble v. Mitchell,* 164 U. S., 370; *Oil Co. v. Texas,* 177, U. S., 46.

Further; the *Algeyer* case, while holding that the right to contract was "property" within the protection of the Fourteenth Amendment, very carefully restricted that holding to the right to make "proper" contracts. That modifying word was carefully applied. It was not intended to hold and did not hold, that the Fourteenth Amendment was intended to secure a right to make any and all sorts of contracts—amongst others contracts for usury. That matter is within the limitations which a state may lawfully impose on the right of the citizen to make contracts.

Holden v. Hardy, 169 U. S. 366.
United States v. Joint Traffic Assn., 171 U. S. 505.
Addystone Co. v. United States, 175 U. S. 211.

FOURTH POINT—Moreover, so far as the assignments of error seek to set up the rights of stockholders, independent of the right of the Association itself, that grievance, if any, is not for plaintiff in error to assert; the corporation, not having the rights of its personal members, cannot invoke the guaranties of the Federal Constitution personal to them. As for itself, and as to its own rights, being a corporation foreign to the State of Mississippi, it has no absolute right of recognition, and the State may impose on it such terms as it may think proper. *Waters-Pierce Oil Co. v. Texas,* 177 U. S. 28. Surely such a corporation cannot justly complain that it is not allowed the privilege of making contracts in Mississippi which the individual citizens of the state are forbidden to make, or not allowed to project into Mississippi its own business against the public policy of the state and subject the lands and homes of those Mississippi people who may be tempted by present needs to make improvident or misunderstood con-

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tracts to the burdens and frequent forfeitures of usurious debts. The prohibition is a legitimate exercise of the police power.

FIFTH POINT—Especially will this court not undertake to review a decision ot a State Supreme Court which holds a contract void as contrary to public policy. It is immaterial that such public policy is declared in a statute, if the statute antedates the contract.

Parker v. Moore, 115 Fed. Rep. 799.
Farrer v. Keach, 15 Wall, 67.
Rockhold v. Rockhold, 92 U. S., 130.
New York Life v. Hendren, 92 U. S., 287.
Bank v. McVeigh, 98 U. S., 333.
Dugger v. Bocock, 104 U. S., 601.
Sam Francis v. Scott, 111 U. S., 769.
Railroad Co. v. Ferry Co., 119 U. S. 624.
New Orleans Co. v. Louisiana Co., 125 U. S., 34.

SIXTH POINT—We respectfully submit that for the reasons given above the question whether the decision of the State Supreme Court is right or wrong is not brought into view; but out of abundant caution we shall submit a very brief argument, or rather memorandum, on that head.

The decision appealed from is in itself correct. It so happens that the mooted questions here have been persistently and repeatedly presented to the State Supreme Court; and that court either perforce or through deference to counsel has so often and so fully considered them and has so fully and argumentatively stated its position that nothing is left to be said—at least nothing occurs to us to say further. The opinions to be found below seem to exhaust the argument.

It may serve a useful purpose, as introductory, to remind this court that the Association established its agency in the State (whatever the nature of it) with all of the statutes cited in the Statement of the Case heretofore made in force, and made the contract in question in 1894.

The cases to be consulted are, in the order as given here:

1.—*Sokoloski v. Association*, 77 Miss., 155.
2.—*Crofton v. Association*, 77 Miss., 166.
3.—*Association v. Shannon*, 78 Miss., 955.
4.—*Association v. Wilson*, 78 Miss., 993.
5.—*Association v. Tony*, 78 Miss., 916.
6.—*Association v. Pinkston*, 79 Miss., 468.
7.—*Association v. Brahan*, 80 Miss., 407.
8.—*Association v. Shannon*, 80 Miss., 643.
9.—*Association v. Farnham*, 81 Miss , 365.

Judge Whitfield in his opinion (Record, p. 107, 108) very carefully analyzes the case of *Bedford v. Eastern B. & L. Assn.*, 181 U. S., 237, and shows that it is in perfect harmony with the ruling of the Mississippi Court. In *Blackstone v. Miller*, 188 U. S., 189, this court declared that nothing but the fact that the law of the place where the debtor is, will make him pay, gives a debt validity. This case goes far to destroy the obsolescent notion of legal fictions in cases where those fictions are opposed to the actual facts; and its essential principle is a strong support for the instant case.

We supplement the citations in the Mississippi cases, by referring to the other late cases of

Association v. Parish (*Neb.*), 96 N. W. Rep., 243.
Skinner v. Association (*Fla.*), 35 So. Rep. 67.

Respectfully submitted,

EDWARD MAYES,
Of Counsel for Defendant in Error.

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FEB 15 1904

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 158.

THE NATIONAL MUTUAL BUILDING AND LOAN ASSOCIATION OF NEW YORK, *Plaintiff in Error*,

vs.

FRANK V. BRAHAM.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

R. C. BECKETT,
Of Counsel for Defendant in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 9648.

(18,733.)

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vs.

FRANK V. BRAHAN, *Defendant in Error.*

STATEMENT AND BRIEF OF R. C. BECKETT, FOR DEFENDANT IN ERROR.

STATEMENT.

This is a case where a stockholder in and borrower from a building and loan association chartered by and under the laws of the State of New York paid up in full and then sued to recover back all except the principal, under the section 2348 of the Annotated Code of 1892 of the State of Mississippi, which section is in these words:

"2348 (1141). LEGAL RATE.—The legal rate of interest on all notes, accounts, and contracts shall be six per centum; but contracts may be made, in writing, for the payment of a rate of interest as great as ten per centum per annum.

And if a greater rate of interest than ten per centum shall be stipulated for, or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

The (1141) refers to that numbered section in the Code of 1880. Some of the pertinent references under this section 2348 are as follows:

"The penalty on a corporation for usury is, a statute not expressly providing a different rule, the same as that imposed on natural persons.

"Grand Gulf Bank *vs.* Archer, 8 Smed. & M., 151.

"Recitals in a contract on the subject of interest are not conclusive on the question of usury.

"Parchman *vs.* McKinney, 12 Smed. & M., 631.

"Nor does the form of the contract cut off the defense.

"McLaurin *vs.* Parker, 24 Miss., 509.

"Custom cannot change the statute.

"Wallace *vs.* Fouche, 27 Miss., 266.

"A stipulation for a greater rate of interest than allowed, whenever and however made, is usurious.

"Union National Bank *vs.* Fraser, 63 Miss., 231.

"Warmack *vs.* Boyd, 63 Miss., 488.

"Rozelle *vs.* Dickerson, 63 Miss., 538.

"One who pays usurious interest can recover it back by suit.

"Bond *vs.* Jones, 8 Smed. & M., 368.

"Parchman *vs.* McKinney, 12 Smed. & M., 631.

"O'Conner *vs.* Clopton, 60 Miss., 349.

"Warmack *vs.* Boyd, 63 Miss., 488.

"A promise to pay compound interest for future forbearance will not be enforced.

"Perkins *vs.* Coleman, 51 Miss., 298."

This Code of 1892, under sections 2 and 3, page 119, was to take effect on November 1, 1892.

In the first section of the act putting it into effect, Code of 1892, bottom of page 113, it is recited that it was prepared by the commissioners "and reported to the legislature by them, and adopted by the two houses of the legislature, the draft in duplicate whereof, as adopted, being now in the hands of the clerk of the house and secretary of the senate respectively, be, and the same is hereby adopted and declared to be the Code of Mississippi," &c.

NOTE.—This recital in the enacting part is copied in order to show that the annotations under the various sections were adopted by the legislature as well as the sections themselves, and that said annotations are not merely the ready reference notes of the compilers, but are a part of the Code itself.

There were two loans to the defendant in error, Brahan, one of $2,500, on May 21, 1892, and the other of $2,000, on August 30, 1894.

Record, pp. 2 and 3.

In the trial court the first was decided in favor of the defendant in that court, the plaintiff in error here, and the other in favor of the plaintiff in that court, the defendant in error here.

There was an appeal and a cross-appeal, and the case was affirmed on the appeal and reversed on the cross-appeal, but as there is no final judgment as to the latter, or loan of May 21, 1892, of course that part of the case can not be considered here. We call the attention of the court to this fact because the briefs of counsel and the opinion of the court of Mississippi refer to both, and we wish to keep this court from being misled.

On this writ of error only the loan of August 30, 1894, is involved. It was for $2,000, and in order to procure it the

plaintiff, Brahan, had to have twenty shares of the capital stock, or $100 of capital stock for each $100 borrowed.

William Gibson was the director of agencies and secretary and general manager, and familiar with all the rules and regulations of the association.

Record, pp. 37–38.

He explains all the rules and regulations under which the money was loaned. On each $100 borrowed the borrower was required to pay monthly dues of 60 cents and interest at the rate of 6 per cent., or 50 cents and a premium of 50 cents, or in the aggregate $1.60 on each $100, which was $19.20 a year on each $100, and which was at the rate of 19½ per cent. interest, if dues be counted as interest.

Record, pp. 50–52.

The first loan was made by Brahan, as above stated, on May 21, 1892, he receiving at the time 25 shares of the capital stock. He paid up this loan in full on November 15, 1893, and retained his 25 shares of stock.

Record, p. 57.

He withdrew five shares of his twenty-five shares of stock in October, 1894, leaving him with 20 shares still in force.

Record, pp. 45 and 58.

We have nothing to do with this first loan here, because the controversy over it was decided against the plaintiff, Brahan, in the trial court, and while that was reversed in the State supreme court on the cross-appeal, yet there has been no new trial and no disposition made of it, and hence, not being in final judgment, this court has no jurisdiction as to it and it is not before this court.

We refer to this only as a part of the history of the second loan, for the reason that the 20 shares were thus obtained by Brahan on May 21, 1892, instead of at the time of the loan,

as was the usual course, and it thus becomes a pertinent part of the case, because at the time Brahan settled up his second loan in full, on March 10, 1897, he was allowed five-sixths of the amounts he had paid as *dues* at 60 cents a month on each of these 20 shares for 58 months, or from May 21, 1892, to March 10, 1897.

Record, p. 55.

The settlement made by Brahan on March 10, 1897, of his $2,000 loan obtained on August 30, 1894, was as follows:

Amount paid on 20 shares for 58 months, at 60 cents per month per share, was $696, and five-sixths of this was $580. Interest for the average time, or one-half of 58 months, is 29 months, at 5 per cent. would make $70.08, or for a day or two over $70.70, which added to the $580 would make $650.70, and deducting one dollar withdrawal fee, would leave $649.70.

Record, p. 55.

He was charged with redemption fees, $10; interest for December, 1896, and January and February and to March 10, 1897, $36.66; premiums for the same time, $30; dues for the same time, $36; fines, $10, and notary fee, $1, making $123.66 for the three months and ten days, which added to the $2,000 principal of the loan, made $2,123.66, and this sum was credited by the withdrawal value above shown of $649.70, leaving $1,473.96 which he paid in cash.

Record, p. 57.

But this transaction did not take into account or make any allowance for the interest at 6 per cent., or 50 cents a month, or the premiums of 50 cents a month on each $100, which, of course, was equal to another 6 per cent., or at the rate of 12 per cent. for both, from the time of the loan, on August 30, 1894, to December 1, 1896, amounting to 27 months, at $20 per month, which made $540, and adding

the premiums and interest for said December, 1896, and January and February and to March 10, 1897, made $623.66.

Hence the actual transaction with Brahan was that he borrowed on August 30, 1894, the sum of $2,000 by check of the plaintiff in error on the Mercantile Trust Company of New York (Record, p. 42), and paid in actual cash interest at the rate of 6 per cent., or 50 cents per month on each $100, and fixed non-competitive premiums of 50 cents, or at the rate of 6 per cent., until the time of the final settlement, on March 10, 1897, in addition to the fines and withdrawal and redemption fees and other small items shown on page 57 of the Record. And this was according to the articles of association. (See Record, p. 33.)

Perhaps these latter items should be coördinated with the withdrawal of stock account, as they would have been required to have been paid anyway on the withdrawal of the installment stock, whether any loan was outstanding at the time or not.

In the settlement Brahan was allowed credit for $649.70 of the $696 which he had paid in on account of his 20 shares of installment stock at the rate of 60 cents per share per month since May 21, 1892. The amount of the credit was less than he had paid in. There were three classes or kinds of shares; the full paid shares, which were sold at 50 per cent. of their face value; the interest-bearing shares, which were sold at 70 per cent. of their face value, and the installment shares, which originated with and for a loan and were paid on at the rate of 60 cents per month per share. These latter, or borrowers' shares, were discriminated against and made to bear all the burdens of the association by a kind of false pretense, as I will endeavor to show in the brief later on.

I think that as a result of the foregoing statement this court can safely say that at the least what Brahan did actually agree to pay and did pay on account of his $2,000 loan was, in interest and fixed non-competitive premiums;

the sum of $623.66, or at the rate of 12 per cent. per annum, and this without the hazard of loss by the association or chance (I will not say hope) of gain by Brahan. Chances same as three-card monte. Hope, but no chance. The association had an agency in Meridian, Mississippi, and its agents there were authorized to receive and receipt for the interest, premiums, and dues. "Dues" were the 60 cents payments on shares (Record, pp. 32, 38). I wish here to call to the attention of this court the fact that the talk about the maturity of shares is apt to be misleading. There was supposed to be a time of maturity of the stock or shares, where no money was borrowed; but in case of a loan there was no such thing as maturity, in the sense of cessation of payment, until the full amount of the loan was paid, principal and interest. After eight years the premiums or excess of interest over 6 per cent. might stop, but even this was subject to repeal or alteration under article 19 of the articles of association, authorizing alterations and amendments; but the principal and the other 6 per cent. interest never ceased until the entire loan, principal and interest, was fully paid.

Record, pp. 32-33 and 35.

Also Mr. Gibson's testimony, Record, p. 51.

The contract was consummated in Meridian, Mississippi, in this, that the papers and the draft for the money were sent to the Meridian agents, with instructions for Brahan to execute the papers in Meridian, and for the agents to pay over to him the draft or money "on his being able to give a clear, unincumbered title to the property, and on the proper execution of the papers."

Record, p. 52.

The articles of association fixed no place of payment (Record, pp. 32-33), and all payments on account of this loan till the final settlement were made to these agents in Meridian.

Record, p. 50.

BRIEF.

There are three things which I propose to notice particularly in this brief:

First. The alleged advantages to the borrower which justified charging him interest or profit at the rate of 12 per cent.

Second. The alleged discrimination in favor of home associations.

Third. The argument in favor of "liberty of contract."

FIRST POINT.

Advantages to the Borrower.

It is practically certain that the lender stood no chance to lose, and hence opposite counsel could found no argument on the right to charge such an exorbitant profit because of the risk involved. Mr. Gibson, the general manager of the association, in his testimony, under the enticing questions of his counsel, frequently speaks of Brahan having enjoyed the advantages of the association and then trying to repudiate his contract.

Right here I wish to say that this fetching term "repudiation" has no application here, and so far as any allegation about the State impairing a contract is concerned, it is so manifestly without foundation that this court would have no jurisdiction under its repeated and emphatic declaration that the mere allegation of a Federal question will not do, but that there must be some real and substantial basis for

the claim. In this case Mr. Brahan paid up every dollar he owed the association and everything they claimed, including the Shakespearean or Baconian pound of flesh and the Biblical "uttermost farthing." If it had stopped there, no one could have complained of the scrupulous exactness of the compliance. It was completely executed. What the defendant in error did was to sue for the penalty for usury, the amount of which is measured by the excess of the payment over the principal of the loan. It is in the nature of a *qui tam* action, and the legislature could just as well have let the penalty enure to the informer; or whoever would sue for it, just as in *qui tam* actions.

In fact, in one of the annotations under section 2348 of the Code of 1892 (see statement *ante*) it is called "the penalty on a corporation for usury," &c., and from time immemorial it has been treated as a misdemeanor, and punished either by a forfeiture of the whole or excess of the interest charge or else by a separate penalty. The fact that the recovery is equal to the interest charge, and is therefore indefinite, amounts to nothing against it, for it is almost universal for the penalty for any offense to vary within certain bounds at the discretion of the judge, and the penalty for usury, from its very nature, is capable of being more equitably adjusted to the offense.

The real question here is whether the State has a right to prescribe a penalty for the act of usury committed within the State.

But, to return to the head of this subdivision, the advantages to the borrower that are claimed to justify the 12 per cent. interest charge. By turning to the articles of association it will be seen that they are very adroitly framed, and if there is anything in them to the advantage of the borrower, I have been unable to find it.

For instance, it reminds one of the old chestnut about the white man and the Indian going hunting and killing a turkey and a buzzard. When they went to divide, the

white man told the Indian that he would give him his choice; that he would either take the turkey and let the other take the buzzard, or the Indian could take the buzzard and he would take the turkey. The Indian remarked, "That looks mighty nice, but it's all the time turkey for the white man and buzzard for the Indian;" and so in this instance, it's all the time profit for the lender and burden for the borrower.

A person who bought and paid for his shares, only paid 50 per cent. on the dollar for them, and the man who bought interest-bearing shares only paid 70 per cent. on the dollar for them, and if either of them wished to withdraw, the one was paid back the full purchase price with interest at the rate of 6 per cent. for the first three years and 7 per cent. for the balance of the time, while the other was also paid back the full purchase price and interest at the rate of 6 per cent., or whatever was the contract rate.

Record, p. 31, s. 3 and 4, and p. 34, s. 2 and 3.

But how was it with the poor borrower on his installment shares? The way that was manipulated was as follows:

A person who desired to borrow was required to take a $100 share for each $100 he wished to borrow. On his loan he was required to pay interest at the rate of 6 per cent., and a premium of 50 cents on each share. Interest at 6 per cent. is $6 on the hundred, which is 50 cents a month, so that the interest and fixed premium amount to $1 per month, or $12 per year on the $100, and is therefore 12 per cent. interest.

Record, p. 33, sec. 2.

The dues on each share were 60 cents a month.

Record, p. 32, art. 10.

Now, the loan fund consisted of 50 cents of the monthly dues paid on each share, &c.

Record, p. 32, art. 12, sec. 1.

If there was 60 cents paid on each share, and only 50 cents placed in the loan fund, what became of the other 10 cents? It went to the expense fund.

Record, p. 35, art. 17, sec. 1.

By turning to this article it will be seen that this expense fund was made up of "ten cents per share of the monthly dues paid on installment shares, twelve and one-half cents per share per month on paid-up shares, and fifteen cents per month per share on the interest-bearing shares, and withdrawal, transfer and redemption fees."

This was evidently done to catch the unwary. If one should complain that 10 cents of his money was taken for expenses, the answer would be that expenses have to be paid; but look how we do it; we fix it so that the heaviest part falls on the paid-up and interest-bearing shares, those most able to bear it.

But who pays this 12½ and 15 cents? There may be some reason for dispute as to who pays the tariff tax, and the man who drew this article must have had that in mind, but it won't work. For instance, if a purchaser of paid-up or interest-bearing shares should draw out his "full purchase price, with interest at the rate of 6 per cent. or 7 per cent.," then who has to pay this 12½ and 15 cents? Of course, it is taken out of the loan fund put there by the borrowers, and any idea that it comes out of the lenders is a mere myth. When the borrower pays the 60 cents on his share, 50 cents of it is placed in this loan fund and the other 10 cents in the expense fund, and that is where the fact that when a borrowing member goes to withdraw they only pay him five-sixths of the amount paid in by him, as shown by the testimony of Mr. Gibson.

He first has to settle up his loan in full under section 3, article 12, of the charter (see Record, p. 33), by paying the principal, interest, premiums, and redemption fee, and having thus purged himself from the stain of an unholy bor-

rower, for no borrower can withdraw, that being confined exclusively to *unpledged shares* (Record, p. 34), they then pay him back the amount of dues paid by him into the *loan fund*. There are the unseen rocks against which he sails. They have only placed, as shown above, 50 of his 60 cents in this loan fund, and the other 10 cents has gone into the expense fund. So when he gets back what he has paid into the loan fund he only gets back 50 cents, or five-sixths of the total amount he has paid, and on a continuing payment, where a man is paid back only five-sixths of what he has paid in at any given time with an average interest of 6 per cent. (or 5 per cent., as was paid in this case, on the testimony of Mr. Gibson), there is no chance for him to get back what he paid in, much less any so-called average interest or any other kind of interest. In fact Mr. Gibson frankly states that the withdrawal value of the borrowers' stock is always less than the full value.

Record, pp. 54, 34.

This is also demonstrated by the fact that when Brahan withdrew his first five shares he had paid on them $84, and only got back $73.90, and when he withdrew the twenty shares now in controversy he had paid in, in the fifty-eight months and ten days, $696 and only got back $649.70. So if there is any advantage accruing to a borrower on account of his ownership of shares, I would like for some one to point it out.

SECOND POINT.

Discrimination in Favor of Home Companies.

It is true that the section 2348 of the Mississippi Code of 1892 provides that "this section shall not apply to a building and loan association domiciled in this State, dealing only with its own members." But the alleged discrimination

created by this provision is more apparent than real both in law and in fact. The domestic building and loan associations were, as a general thing, created by special acts of the legislature, and hence the range and limits of their powers and authority were contained in the charters themselves, and so far as they were concerned all the effect this provision had was to prevent any controversies as to whether a special act was repealed or modified by a general law, &c. The State supreme court, however, decided, contrary to the general impression, that building and loan associations could be organized under the general corporation law, and that it was not necessary to resort to a special act. And when we examine the general law we find that it has an express provision that "but the governor may require amendments or alterations to be made previous to signing the same, or, if deemed expedient by him, he may withhold his approval entirely;" and when the governor withheld his approval there was no remedy except an appeal to the legislature for a special act.

Code of 1892, sec. 833.

The charter has also to be passed by the attorney general of the State, and, as both he and the governor are elected by and responsible to the people, it is not likely that any charter that was oppressive to the people would be allowed to get through. And as a matter of fact I do not believe there is a single domestic building and loan association in active operation in the State. I think what few there are do not take new business, but keep up their organizations merely to wind up the old business. They are of comparatively recent origin. There seems to have been none in the State previous to about the last decade, as the first time they begin to appear in the Mississippi reports is the case of Sullivan *vs.* B. & L. Association in the 70 Miss., in 1892.

But even if there was a discrimination in their favor it would not be legal cause for complaint, as the State has a

right to prescribe on what terms foreign corporations shall do business in it. Some of the cases holding and illustrating this, with its limitations, are—

Farmer's, &c., Ins. Co. *vs.* Dobney, 189 U. S., 304–305.
Chattanooga Bldg. & L'n Ass'n *vs.* Denson, 189 U. S., 416.
Bedford *vs.* Eastern Bldg. & L'n Ass'n, 181 U. S., 241–242.
Cable *vs.* U. S. Life Ins. Co., 191 U. S., 288.

As this question, with the limitations mentioned in the last cited case, Cable *vs.* United States Life Insurance Company, 191 U. S., 288, is intimately connected with the subject of the next head, "Liberty of contract," we will argue them together under that title.

THIRD POINT.

Liberty of Contract.

As stated under the preceding head, discrimination and liberty of contract, in reference to contracts, are so intimately connected that they may well be argued together in this particular case. As there stated broadly, a State has the right to prescribe the conditions on which foreign corporations may do business in it. The limitations there hinted at are found in the case of Cable *vs.* United States Life Ins. Co., 191 U. S., on page 307. They are thus laid down:

"It has been held from an early day that a corporation created by one State could transact business in another State only on the consent, express or implied, of the latter State, and that such consent might be accompanied by such conditions as the latter State might think fit to impose, provided they were not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of

each State free from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

And the court then cites the line of previous decisions on that subject.

As to the constitutional provision that the "citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States," they, in another case, hold and reaffirm the doctrine that a corporation is not a citizen within this section, also citing the authorities.

Anglo-Am. Prov. Co. *vs.* Davis Prov. Co., 191 U. S., 374–375.

Does this case then fall within any of the limitations laid down in the Cable case, *ante?* An illustration of one of the limitations is found in the case of Bedford *vs.* Eastern Building & Loan Association, 181 U. S. (much relied on by opposite counsel), where this court simply holds that a State cannot pass a subsequent law to impair the obligation of a contract previously made. On January 2, 1891, Bedford applied for a loan, and his application was accepted on February 2, 1891, and the impairatory law, if I may use that expression, was passed on March 26, 1891, and, while the money had not then been paid over, this court held that as the transaction was so far advanced that a full compliance could be enforced by suit, therefore it was a vested right and protected from impairment (181 U. S. R., 239–240 and 241–242).

In reference to the defense of usury, the by-laws provided that "all payments should be made to the secretary of the association, at the home office, in registered letter, express, or money order or drafts;" and, while the members were permitted to forward payments through the local treasurer to the association at Syracuse, New York, it was expressly provided by the by-laws that "in so doing the local treasurer was acting as the agent for the stockholders, and not

for the association" (p. 229). The supreme court of Tennessee had held in the case of Pioneer, &c., Loan Co. *vs.* Cannon, 96 Tenn., 599, that as to a similar transaction by a Minnesota building and loan association, it was a Minnesota contract and valid and enforceable in Tennessee (181 U. S. R., 243), and this court say: "The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act was passed," &c. (p. 233); and on page 236 it is said that there is no evidence that the association solicited stock subscriptions after March 26, 1891. The supreme court of Tennessee held in another Minnesota case that it was a Minnesota contract (p. 236), and I suppose in this case that it was a New York contract; but they further held that on account of this subsequent law of March 26, 1891, they were void and could not be enforced in Tennessee. The difference between that court and this court was, that court held the contracts inchoate and therefore subject to this subsequent law, while this court held that they were so far advanced as to confer vested rights which could not thus be impaired.

It does not anywhere appear in the statement of the case or in the opinion of the court that there was any plea of usury, but in answer to the claim that they were affected with usury the court say that they were payable in New York and were not usurious under the laws of New York, and they further show that they were not usurious under the laws of Tennessee existing at the time. As before stated, it is in the statement that the business was lawful at the time the contracts were made and had been so held by the supreme court of Tennessee, and then this court proceeds to show, in an independent opinion of its own, that they were not usurious under a former decision of its own in Spain *vs.* Hamilton, 1 Wall., 604, because the promise to pay a sum above legal interest depended upon a contingency and not upon the happening of a certain event (p. 242).

I have been thus particular in quoting the Bedford case because it is *the* case relied on by opposite counsel, and I wish to show that it is not applicable.

That contract was perfectly legal, both under the laws of New York and Tennessee, at the time it was made. It is not applicable, and certainly is no authority against our contention here that a State has a right to prohibit the transaction of a usurious business or one against its public policy within its domain. It would certainly present a humiliating spectacle if the State could establish an unobjectionable public policy, which its own citizens could not violate, and yet foreigners and strangers could come and set up an agency and violate it right under their eyes; and if a New York corporation could do it, for the same reason an English or other foreign corporation could do the same thing.

The proposition is that the State can prohibit the doing of a usurious business by the agents of a foreign corporation within its confines without any regard to how or where the results of it are payable. No such statute appears in the Bedford case, but the Mississippi statute on that subject is as follows:

"SECTION 849 (1042). OF FOREIGN CORPORATIONS.—Corporations which exist by the laws of any other State of the Union, by the acts of Congress, or the laws of any foreign country, may sue in this State by their corporate names, and they shall also be liable to be sued or proceeded against, by attachment or otherwise, as individual non-resident debtors may be sued or proceeded against. And the acts of the agents of any such foreign corporations shall have the same force and validity as the acts of agents of private persons; but such foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy."

The (1042) refers to that numbered section in the Code of 1880.

And such has been the law of Mississippi for many years. Code of 1871, section 2416, &c.

Now, here is a plain and positive declaration that the acts of the agents of foreign corporations shall be the acts of the corporations themselves, and that they shall not do or commit any act contrary to the laws or public policy, and if they do no recovery can be had. The papers were executed in Meridian, Mississippi, and delivered to the agents of the corporation there, and their draft or money was delivered to the borrower there, and the security was a trust deed on lands in Mississippi, a foreclosure of which necessarily had to be in and through the courts in Mississippi, and could not possibly be anywhere else, for no other court would have any jurisdiction over real estate situated in Mississippi.

Previous to this transaction the courts in Mississippi had established the doctrine that where an act resulting from a series of acts had to be traced through one which was illegal no recovery could be had on it.

For instance, if an agent took a note in this State for a slave which had been sold in violation of law, it would be void, though payable in another State.

Bank *vs.* Newberry, 41 Miss., 142.
Wooten *vs.* Miller, 7 Smed. & M. (15 Miss.), 380.

And so if any part of a transaction has to be traced through a usurious act.

Coulter *vs.* Robertson, 14 Smed. & M. (22 Miss.), 18.

And so if any material part of a contract is performed on Sunday.

Kountz *vs.* Price, 40 Miss., 341.
Miller *vs.* Lynch, 9 George (38 Miss.), 344.

And so if any part of a contract for cotton futures is transacted here, though the note is made payable in Liverpool.

Lemonius *vs.* Mayer, 71 Miss., 514.

An usurious contract made in Tennessee, secured by mortgage on lands in Mississippi, was allowed to be enforced here, because it was not usurious under the laws or public policy of Mississippi, and the judges mention that ground.

Kendrick *vs.* Kyle, 78 Miss.

This last decision, however, was made after the contract in question.

And so this court has refused to hold contracts legal which were made in violation of the express laws and public policy of a State, though they were made payable in New York. So held where Fowler and his wife executed a deed of trust to Jonathan Edwards, as trustee, to secure a loan from the Equitable Trust Company, a Connecticut corporation, though Fowler was a citizen of Illinois and the real estate was there, but the mortgage and notes were made payable at the office of the corporation in New York. That case seems to be almost an exact counterpart of this. The contract was held to be usurious.

Fowler *vs.* Equitable Trust Co., 141 U. S., 384, 386, 393.

And so where the Scottish Mortgage and Investment Company of New Mexico, "a private corporation organized under the laws of Great Britain," loaned money in New Mexico, through its agent there, and payments were made to this agent.

McBroom *vs.* Scottish, &c., 153 U. S., 318, 320.

The same principle is illustrated in the case of Savings and Loan Society *vs.* Multnomah (60 Feb. Rep.), affirmed in 169 U. S., 421.

In another case this court, following the supreme court of Alabama, held that "a loan or borrowing of money by or from a foreign corporation was a doing of business in that

State" and "an unlawful act," without complying with the laws of the State; and when it was urged that it was a Tennessee contract, like the Bedford case, and the Bedford case was expressly relied on, this court answered by saying, "We think there is a marked distinction. In the Bedford case the contract was legally entered into and was entitled to be enforced. In the case at bar the contract was made in violation of the statute of Alabama, and it cannot, therefore, claim the protection given to the contract in the other case."

Chattanooga Bldg. & Ln. Assn. *vs.* Denson, 189 U. S., 408.

And so the plaintiff in error here was doing business; was, through its agents, "committing acts" in furtherance of a transaction in violation of the laws and contrary to the public policy of Mississippi.

Section 2348 of the Code of 1892 prohibits not only stipulating for, but the receiving of a greater rate of interest than 10 per cent., and section 849 provides that "foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof," &c. Now, if a rate of 6 per cent. for interest and another 6 per cent. for premiums, making 12 per cent., is usury, then it is admitted that this amount was paid monthly in Meridian, Mississippi, to the local agents of the plaintiff in error, and was certainly a receiving of more than 10 per cent. in "this State." The supreme court of Mississippi had long previously decided, which decision was adopted by the legislature as one of the annotations under the section 2348 of the Code of 1892, that "the penalty on a corporation for usury is, a statute not expressly providing a different rule, the same as that imposed on natural persons" (Grand Gulf Bank *vs.* Archer, 8 Smed. & M., 16 Miss., 151).

And this statute is constitutional. It is illustrated by a case lately decided by this court, in which insurance brokers in New York had a branch in Massachusetts, and an agent

in Boston solicited insurance from a man there, and sent his authority to procure insurance to the head office in New York, who procured the insurance from the Lloyds in England, and they sent the policy to the Boston agent, who delivered it to the applicant. It was claimed that it was an English contract, and to punish it in Massachusetts was an unconstitutional interference with the liberty of contract and also with interstate commerce; but this court answered that a contract of insurance, though intimately connected with commerce, yet was not commerce (and much less would a building and loan contract be, which has no connection with commerce); and they further held that the transactions were committing acts, doing business unlawfully in Massachusetts, and subject to its penalties therefor.

Nutting *vs.* Massachusetts, 183 U. S., 553, 556–557.

The principle of that decision is exactly in point. While it denies the right of a State to prohibit one of its citizens from going out of the State and making contracts in another State, yet it sustains the right of a State to prohibit foreign corporations from coming into the State and either their officers or agents committing acts there contrary to its laws or public policy.

In another case, where a ticket was issued for the transportation of a passenger from Antwerp to New York, and contained provisions exempting the vessel from liability for loss of baggage, which was legal in Belgium, but not in the United States, and in a suit in a United States court for the loss of the baggage the law of Belgium and this provision in the ticket were relied on, this court held that neither as a matter of law or comity would a country enforce a contract contrary to its own laws or public policy. It was expressly provided in the face of the ticket that "all questions arising hereunder are to be settled according to the law of Belgium, with reference to which this contract is made;" and this was also relied on; but this court said: "It is true

as a general rule that the *lex loci* governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of the contracting parties can the public policy of a country be set at naught."

The *Kensington*, 183 U. S., 269–270.

The court said it made no difference that the point had not previously been decided, and in answer to the contention that the provision was simply a question of contract, and "no offense against morality was committed in making them," you said it is "the existence of the rule of public policy, not the ultimate causes upon which it may depend, is the criterion."

The question of usury is one of local law.

Massachusetts Ben. Co. *vs.* Miller, 137 U. S., 689.

The land was situated in Mississippi and nearly all the actual transactions took place there, and the supreme court of Mississippi has decided that it was against the laws and public policy of that State, and you are bound by that decision. "It is a construction or application of the statute to the case in hand and is binding on us."

Gallup *vs.* Schmidt, 183 U. S., 300, 305.

The act need not be immoral, if it is against public policy. I take it that whatever is detrimental to the welfare of its citizens is contrary to the public policy of a State. It cannot be denied that the taking of an exorbitant interest or profit on the loan of money is detrimental to the general welfare, and especially if that interest or increment is carried beyond the confines of the State, as is the case when it is paid over to a foreign corporation.

I think this is demonstrable. If I take one dollar out of one of my pockets and put it in another I am neither richer

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nor poorer than I was before, and so if A and B, two citizens of the same State, trade with each other. If A lends B $100 at 10 per cent. interest, when B pays it to A it still remains in the State, and hence the State is as rich as it was before and is not injured; but if it is paid to a foreign corporation and taken to New York, then there is that much more money in New York and that much less in the State from which it was taken.

But even if a citizen of Mississippi loans money to another citizen at a greater rate of interest than he is able to pay, the latter will either lose all his property, if he has any, and, if he has not, he will be effectively prevented from accumulating any, and in his old age or in disease, when he is no longer able to work, will be thrown back as a pauper on the State to support and take care of. And, besides this, the man himself, while he is able to keep body and soul together by his labor, will be so pinched by necessity that he will never be able to extract his due and proper proportion of happiness out of this sphere of existence, and all because he has been robbed by the money-lender.

But you may say this is too harsh a term—that a robber takes from a man by force and against his will.

But suppose the victim is sick and in need of medicine. He is not able to buy it, and yet his life depends on getting it. You charge him 20 per cent. to lend him the necessary amount, and that is all he can make when he is well. He gets well and then has to set to work to pay this interest. In the meantime he gets sick again from overwork in trying to keep the interest paid. Having absorbed everything in trying to pay the interest, he is not able to get any more medicine and dies for want of it. The lender has thousands, and whether he got 5 per cent. or 20 per cent. is of not much consequence to him. He has more than he can find any chance to spend, anyway. The robber would say, "It is true I pointed a pistol at him, but he reached down in his pocket and handed me his pocket-book himself;" but the answer is

he did it as a matter of necessity, and you brought about that necessity; and so in the other case the sick man agrees to pay you the 20 per cent. as a matter of necessity, and you may say you are not to blame; but if you have been charging him more interest than was necessary for you and more than he was able to pay, you have succeeded in transferring all his property and earnings to yourself, and you have brought about the condition he is in. The only difference is that probably it took you a little longer to get him in the fix that he is compelled to give anything you ask than it did the robber. One is prompt robbery and the other is slow robbery, and I think the quick robbery is less agonizing and distressing, for the victim can go about making something else, while you keep on taking all he makes.

And it is to the interest of the State and for the general welfare to keep one class of citizens from pauperizing another class and throwing the expense of maintaining them on the body politic, and also to conduce as much as possible to the equal opportunities and happiness of all its people. It is to its interest thus to keep its own citizens from dealing unfairly one with another, and much more so to prevent foreign corporations from doing so, for, as I above tried to show, that is much more detrimental, in that it takes the money out of the State and tends directly to bring about hard times.

This is the principle that the protective tariff is founded on, viz., that it keeps the money in the country. The theory is that if we can keep our money at home and supply everything that is needed, that with our enormous productive capacity we are bound to increase rapidly in wealth and prosperity, and that part of it seems to be a fact. The difficulty is exactly the same as in charging too high a rate of interest. When you do that you inevitably create classes and oppress one part of the citizens for the aggrandizement of another part, and then it ceases to be for at least the *gen-*

eral welfare and becomes for the welfare of a class at the expense of another.

As to what is the proper profit so as not to be oppressive is a very difficult matter to decide, and hence must, as a general rule, be left to each State to determine for itself.

The general principle to be observed is that if the manufacturer takes a greater profit than the consumer is able to produce or spare, and the lender takes more interest than the borrower is able to make or bear, then they are both to that extent killing the goose that lays the golden egg, the golden egg representing the general welfare or the opportunity to preserve or better one's condition.

The taking of usury has always been considered to be more or less detrimental to the general welfare.

Even as early as B. C. 1491, as appears in Exodus, ch. 22, v. 25, and Leviticus, ch. 25, v. 36, 37, the Hebrews were forbidden to take usury from each other or from strangers. About B. C. 1451 they were again forbidden to take usury from each other, but were permitted to exact usury of others (Deuteronomy 23, v. 19, 20).

In Smith's Bible Dictionary, page 318, under the head of usury, he says that charging usury "was used as a means of ruining the Canaanites," and it must be admitted that there is nothing that will ruin a man sooner or more effectually than attempting to pay an exorbitant rate of interest.

About the year B. C. 712 it was supposed to be equally as disastrous to the lender as the borrower (Isaiah, ch. 24, v. 2).

In the year B. C. 700 it was classed with "unjust gain" (Proverbs, ch. 28, v. 8).

In the year B. C. 594 it was called one of the "abominations"—Ezekiel, ch. 18, v. 8, 13; and in ch. 22, v. 12, it is classed with "extortion."

About the year B. C. 445, according to the same authority, Dr. William Smith, they were forbidden to exact usury from any one, either Jew or Gentile, in the commandment "let us leave off this usury" (Nehemiah, ch. 5, v. 10).

The word usury does not seem to occur in the New Testament. Under the King James version it occurs twice—once in Matthew, ch. 25, v. 27, and once in Luke, ch. 19, v. 23—but in both instances it was a reprimand to the man with one talent for not improving it, for not putting his talent to the usurers, for not doing the best he could with whatever opportunities he had. This, however, appears to be a mistranslation, and in the place of the word "usury" the Revised Version has it "interest." It has at times under the English law been severely punished. It has in fact in many times and many countries been the cause of the severe prejudice against the Jews.

There is a point at which a just compensation for the use of money is both a benefit to the lender and borrower, and on the proper side of this line the lending and borrowing of money is a distinct benefit to commerce, in that it enables it to be easily, promptly, and successfully carried on. Circumstances change, and what is the proper line must and should be left to the State, to the people among whom the business is being transacted and who are familiar with all the surroundings.

I will now close this part of the brief and endeavor to show that the charge of 6 per cent. for interest and 6 per cent. for premiums was usury pure and simple, and that there was no risk or hazard to the lender or chance of gain to the borrower. The workings of these building and loan associations are very complicated, no doubt purposely so, and are very apt to confuse. When I was a youngster at school and college I had a little reputation as a mathematician, and I will now see if it will enable me to explain intelligently the scope, plan, and ultimate result of a loan from this association.

Under article 17 of the articles of association there was established an expense fund, and into this was paid "ten cents per share of the monthly dues paid on installment shares, twelve and one-half cents per share per month on

paid-up shares, fifteen cents per share per month on interest-bearing, paid-up shares, and transfer, withdrawal, and redemption fees."

Record, p. 35.

The full-paid shares were sold at 50 cents on the dollar, and interest-bearing, paid-up shares were sold at 70 cents on the dollar, and both these classes of shares "shall be liable for no further dues or assessments."

Record, p. 31, art. 8, secs. 3 and 4.

The interest-bearing shares were entitled to "interest at the rate of 6 per cent. per annum upon the purchase price" (*Ib.*).

On withdrawal the paid-up non-interest-bearing shares were entitled to interest from the earnings at the rate of 6 per cent. for the first three years and 7 per cent. thereafter.

Record, p. 34.

The main difference between the simple paid-up shares and the paid-up interest-bearing shares seems to be that the one received interest if earned and the other absolutely, and in case of a corporation with no individual liability, I don't see much difference, as on the theory on which the business was conducted, of charging borrowers 12 per cent. interest, there was very likely to be some earnings.

A borrower was required to have one share of stock of the face value of $100 for every $100 borrowed by him, and he was required to pay on this share 60 cents per month, and on each $100 of the loan he was required to pay 50 cents per month under the name of interest and 50 cents per month under the name of premiums. The 60-cent payments on the shares were called "dues." The three payments were thus classified as dues, interest, and premiums. I ask the court to keep this distinction in mind, as it will make my explanation simpler.

Rec., p. 32, art. 10, and p. 33, art. 12, sec. 2.

Different periods have been set for maturity in building and loan associations, but in this case it was fixed at eight years.

Record, p. 33, sec. 2.

Now, let us work out a transaction on this basis of eight years. Suppose a man wants to borrow $600. Before he can borrow the $600 the association must have the $600 to lend him. It goes out and sells two paid-up shares of the par value of $100 each for $50 each, and thus raises the money, selling twelve shares to raise the $600. It then lends this $600 to the borrower, but out of it he must pay all charges for fixing up the papers, and then pay the premium for six months in advance, so that he really does not get the full $600, but that much less the six months premiums, or $582.

Record, p. 33, sec. 2.

He now pays at the rate of 50 cents per $100 as interest and 50 cents per month as premiums, or at the rate of 12 per cent. per annum on the whole $600, although he only received $582. Besides, he pays the sum of 60 cents per share per month by way of dues.

Now, what becomes of this $1.60 per share per month?

Of the 60 cents "dues," nominally 10 cents is placed in the expense fund and the balance of 50 cents in the loan fund. For each paid-up share twelve and a half cents per month is also placed in this expense fund and fifteen cents for each share of paid-up interest-bearing stock. In the further calculation I will omit the 15-cent or interest-bearing shares, as the amount paid for them, $70, puts them about on an equality with the twelve and a half cent stock, and omitting them will save time and space. But neither of these two classes of shares were subject to any further dues or assessments.

When the purchaser buys and pays for his two paid-up shares at $50 each this $100 is loaned to the borrower, and hence there is no money on hand from the paid-up-share fund to pay the twelve and a half cents a share, such shares not being subject to any further dues or assessments, and hence of necessity it must be taken out of that part of the loan fund put there by the borrower. I suppose what is meant by each share of paid-up stock paying twelve and a half cents per month into the expense fund is that while the purchaser only pays $50 for the share, yet it is a $100 share, and at maturity he would otherwise be entitled to draw out the full $100; but as there has been twelve and a half cents per month, or $1.50 a year, or $12 for the eight years, charged on this share for dues in the expense fund, he would only be entitled to draw out his $50 paid in and the other $50 to make face value, less the $12 for dues, or $38, which, added to the $50 paid in, would be $88 to which he is nominally entitled.

Now the borrower, as I have above shown, is entitled to five-sixths of the amount paid in by him, with interest, as was allowed in the actual settlement in this case, at the rate of 5 per cent. On his $100 share he has paid in 60 cents a month, which is $7.20 a year, and $57.60 in the eight years. Of this $57.60, under the rules he is paid back five-sixths, which is $48, and as it was raised by continuous payments of 60 cents a month he is paid interest at the rate of 5 per cent. for the average time, or one-half of the eight years, which, of course, is four years. Interest at 5 per cent. for four years is 20 per cent., and interest on the $48 at 20 per cent. is $9.60, which added to the $48 makes $57.60, or the exact amount he paid in. If you take out one-sixth of a given amount you will have to add one-fifth of the remainder in order to make the remainder equal the original sum. One-fifth is 20 per cent., and hence it is easy to see that if you take out one-sixth of any given amount it will take eight years to replace it at

a rate of interest of 5 per cent., or 6⅔ years at a rate of 6 per cent., &c., the amount required being in each case one-fifth, or 20 per cent. The "maturity" seems to mean that time when the remainder left after deducting a certain sum for expenses or otherwise at a certain rate of interest will exactly reproduce the aggregate of the sums paid in. The effect of it is, then, that the borrower at the end of the eight years would, on his stock, get back exactly the amount that he had paid in, without a cent of interest—that is, for the privilege of being allowed to borrow a certain sum at the rate of 12 per cent. interest he, in addition, must furnish the lender another certain sum for eight years without interest. That is the actual result, and the legerdemain of saying that he will get back five-sixths of what he pays in, with an average interest of 5 or 6 per cent., is a mere play upon words. What he actually gets back at the end of eight years is what he actually paid in, without any interest. That disposes of the "dues," or 60 cents a month payments on account of shares.

Of the 6 per cent., or 50 cents a month, which he pays *eo nomine* as interest on each share, that goes to pay the buyer his 6 per cent. interest on the purchase price of his two shares at $50 each, or $100 for the two.

We have now paid the borrower back the money he paid in on account of dues, and the purchaser, or lender, his 6 per cent. interest, and that leaves only the 50 cents a month on each share paid as "premiums." Of this amount 10 cents goes into the expense fund, nominally under the necromantic allegation of 10 cents out of the 60 cents for "dues," but, wherever it actually comes from, it goes into that expense fund. As before said, the alleged purchaser, the man who furnished the $100 to lend the borrower, gets for his $100 two shares, and on these is paid into the expense fund 12½ cents each, or 25 cents for the two, and, as the buyer is liable to no further dues or assessments, this 25 cents must come out of the 50 cents a month paid in by the borrower as premiums. We have disposed of everything else, and hence

there is nothing else for it to come out of. Here is now, then, 10 cents and 25 cents, making 35 cents paid into the expense fund, all of which, perforce, must come out of the 50 cents a month paid in for premiums. That leaves 15 cents of the premium fund, which is $1.80 a year, or $14.40 for the eight years. The borrower pays back the principal of his loan, $100 per share, but, of course, this has to be paid back to the purchaser, who advanced it and is entitled under the articles to be repaid the "purchase price," with interest at the rate of 6 per cent. for the first three years and at the rate of 7 per cent. "thereafter."

Record, p. 34, art. 15, sec. 2.

Now on his $100 the purchaser after three years is entitled to interest at the rate of 7 per cent. We have already paid him the 6 per cent. that the borrower paid as interest on his loan. Hence the purchaser is only entitled to 1 per cent. more for five years, or the "thereafter" of the eight years, after the three years. One per cent. a year for five years makes 5 per cent., and 5 per cent. on $100 is $5. Take this $5 from the $14.40 and it leaves $9.60 to be disposed of. If it is distributed equally among the shares, then the lender has two shares and the borrower only one. Of the $9.60, then, the lender gets two-thirds, or $6.40, and the borrower one-third, or $3.20; but out of this $3.20 the borrower will have to pay a withdrawal fee of $1, which will leave him $2.20, or 55 cents a year for the average time, or four years, on the amount, $57.60, paid in by him for his stock, which is less than 1 per cent. interest, and this if everything goes through without a hitch; but of course if there are any hitches, or lawsuits, or extra expenses, he will not get even this 55 cents. It is the most he can expect. The small amount of fines by the time they are divided up among all the lenders and borrowers would be a very insignificant thing at best, and besides they would be more than likely to be consumed in expenses.

In order to get even this 1 per cent. the money would all have to be kept loaned out every minute of the time. Article 15 of the articles of association (Record, p. 34) provides that in case any money cannot be loaned, it "may be invested in such securities as the laws of New York permit for the investment of savings banks' deposits." But this court can be said to know almost judicially that such first-class investments would not yield over an income of 6 per cent., and this would have to be paid to the man who originally furnished the money by buying the paid-up shares, and instead of being any benefit would still be a distinct loss to the borrower, and it would only lessen his loss. In order to keep up the average the money must all be kept out at 12 per cent., the amount he has to pay, instead of 6 per cent.

There is practically no hazard to justify an unusual rate of interest.

Under article 12, section 4, of the articles of association, the borrower has to furnish real-estate security with a clear, unencumbered title, and the loan must "not exceed 60 per centum of the cash value of such security," and this is the proportion that banks and loan companies have found by experience to be practically safe and the kind of security they are all anxious to lend their money out on at the very lowest rate of interest, and hence there is, as a legal proposition, no hazard whatever, and, as I have shown, there is no chance for the borrower to make any, even the lowest, rate of interest *on his investment*—not even as much as the lowest-rate Government bonds would yield. He takes the stock because he is forced to in order to get the loan, and not because he wants the stock. It is discriminated against all the way through, and is no inducement whatever. It will be noticed that the purchasers of paid-up and of paid-up interest-bearing shares are subject to no further dues or assessments, and hence that, under cover of multitudinous language to obscure and conceal the true results, the borrower has to

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pay every single bit of the expenses of the association. Nobody else pays a single cent towards it. Burden after burden is piled upon him until he comes forth, like the "old man of the sea," bowed down with the weight of the enormous burdens. He has ministered to everybody and kept everybody's feet warm, and gets nothing for it in the final wind-up.

His only consolation is that when he appears at the judgment bar St. Peter will tell him that, though his sins were as the sands upon the seashore for number and as the cloud-capped mountains for size, he has suffered enough, and to enter at once into the joys of his Lord.

I think the correct view is that man, as a member of a complex society having rights and duties as well as he, has no scriptural, moral, or legal right to live for himself alone. He may not be exactly limited to the prerogatives of the Autocrat of the Breakfast Table, to depend on the voluntary contributions of his neighbors for his subsistence, while creating a little sunshine for their comfort and happiness, on the one hand, but neither is he entitled, on the other hand, to assume the prerogatives of the Autocrat of all the Russias or to invoke in free America the doctrine that the king can do no wrong, in reference to the liberty of contract or otherwise.

I think we can safely say that as a result of the foregoing views, while as a general rule a man has an inalienable right to the liberty of contract and to do with his own as seems best to him, yet as a recompense to some extent for living in society and being protected by its laws and its members, the above rule must be modified to the extent that he must surrender something for these privileges, and that as a partial contribution to the general good his liberty of contract and right to dispose of his own as he pleases must be with the qualification that other members of the com-

munity also have some rights, and that therefore his rights are only comparative and are not unlimited, and that if he is allowed a fair remuneration in his contracts and in the disposition of his property, that is all he has any moral or strictly legal right to claim, and he has neither of these rights to go beyond that and injure and ride rough-shod over his neighbors, whose stout hearts and brawny arms are perhaps the only bulwark he has for any protection at all. He is perhaps forgetful or unmindful of the fact that but for the protection of this class he would be unable to own or hold anything; and, as a matter of fact, instead of surrendering any rights he has vastly more rights and power by reason of the very protection which in his puffed up *ego* he is seeking to ignore. In conserving the general welfare the state is not confined to the interests of one man or one set of men, but must look to the whole as the body politic, and has a right to so regulate the business of one or a few as to conduce to the interests of all.

This court has decided that where a person or corporation comes into a State and establishes an agency and this agent lends out the money of his principal and fixes the papers and collects the payments it is such a doing of business and so localizes it that it is subject to the taxing laws of the State.

City of New Orleans *vs.* Stemple, 175 U. S., 309.
Bristol *vs.* Washington County, 177 U. S., 133.
State Board, &c., *vs.* Comptior Nat. d'Escompte, 191 U. S., 388; 60 Fed. Rep., 31; affirmed in 169 U. S., 421.
88 Fed. Rep., 578; 96 Fed. Rep., 578.

And if such acts subject the business to taxation it is difficult to see why they should not subject it to the usury laws and other laws and the public policy of the State.

For other more or less analogous cases on the subject of usury by building and loan associations, I refer the court to

Nat. Mut. Bldg. & L'n Ass'n of N. Y. *vs.* Burch, 82 N. W., 837 (Mich.).

Phœnix Bldg. & L'n Ass'n *vs.* Stringham, 81 Ill. App. 48 (Ill.).

Douglas *vs.* Cavanaugh, 90 Fed. R., 373 (Tenn.).

McIlwaine *vs.* Ellington, 111 Fed. R., 578 (N. C.).

Interstate, &c., *vs.* Badgley, 115 Fed. R., 390 (Ore.).

South'n, &c., *vs.* Johnson, 111 Fed. R., 657 (Va.).

Coltraine *vs.* Baltimore, &c., 110 Fed. R., 293 (Md.).

Sokoloski *vs.* N. S. Bldg., &c., 77 Miss.

Fid., &c., *vs.* Shea, 55 Pac. R., 1022 (Idaho).

Nat., &c., *vs.* Keeny, 77 N. W. R., 442 (Neb.).

This is the same building and loan association as here, and so is each one commencing with "Nat., &c."

Wilcoxen *vs.* Smith, 78 N. W., 217 (Iowa).

See especially Savings, &c., *vs.* Strine, 78 N. W., 377 (Neb.).

Hale *vs.* Stenger, 61 Pac. R., 156 (Wash.).

Pac., &c., *vs.* Green, 114 Fed. R., 412.

For the list of Mississippi cases on this subject I refer to the last page of the brief of associate counsel, page 16, and also for some decisions from other States.

I also refer to the brief of the defendant in error, who is an attorney and filed a brief in the State supreme court.

See this case in 80 Miss., pp. 415–416.

For an exhaustive collection of the authorities, I refer to the various opinions of the supreme court of Mississippi in the different cases of this character as listed by associate counsel on said last page of his brief.

And as a ready reference sheet to cases applicable to various phases of this case, I refer as follows:

Bound by interpretation by State supreme court of its laws.

N. Y. Life Ins. Co. *vs.* Cravens, 178 U. S., 395.

Questions of fact or of general or local law not reviewable on writs of error from State courts.

Thayer *vs.* Spratt, 189 U. S., 346.
Avery *vs.* Popper, 179 U. S., 305, 315.
E. Bldg. & L'n Ass'n *vs.* Ebaugh, 185 U. S., 120–121.

Full faith and credit not denied where statute of another State merely construed and its validity not questioned.

Finney *vs.* Guy, 189 U. S., 335.
Andrews *vs.* Andrews, 188 U. S., 14.
Johnson *vs.* N. Y. Life Ins. Co., 187 U. S., 491.
E. Bldg. & L'n Ass'n *vs.* Williamson, 189 U. S., 125–127.

Impairing a contract is only by subsequent laws and not by erroneous decisions of the courts.

Weber *vs.* Rogan, 188 U. S., 10.
159 U. S., 103; 163 U. S., 278; 172 U. S., 116, 127.

There must be a *bona fide* Federal question involved; a mere allegation cannot create one where none in fact exists.

Sawyer *vs.* Piper, 189 U. S., 154.
Equitable L'n Ass'n Soc. *vs.* Brown, 187 U. S., 311.

On the above and foregoing reasoning and authorities I ask that this case be either dismissed or affirmed.

Respectfully submitted.

R. C. Beckett,
Of Counsel for Defendant in Error, F. V. Brahan.

Supreme Court of the United States.

No. 158.—October Term, 1903.

The National Mutual Building and Loan Association of New York, Plaintiff in Error, *vs.* Frank V. Brahan. } In error to the Supreme Court of the State of Mississippi.

[April 4, 1904.]

This action was brought in the Circuit Court of Louderdale County, Mississippi, to recover interest, claimed to have been usurious, paid by defendant in error to plaintiff in error upon a loan made by the latter to him. The action was brought under section 2348 of the Code of the State of 1892, which provides as follows:

"The legal rate of interest on all notes, accounts and contracts shall be six per centum; but contracts may be made, in writing, for the payment of a rate of interest as great as ten per centum per annum. And if a greater rate of interest than ten per centum shall be stipulated for, or received in any case, all interest shall be forfeited, and may be recovered back, whether the contract be executed or executory; but this section shall not apply to a building and loan association domiciled in this State, dealing only with its members."

The case was tried to a jury, which, under the instructions of the court, returned a verdict for the defendant in error, upon which judgment was duly entered. The judgment was affirmed by the Supreme Court of the State. (80 Miss. 407.) This writ of error was then sued out.

The plaintiff in error is a building and loan association, incorporated under chapter 123 of the Laws of the State of New York, passed April 10, 1851, entitled "An act for the incorporation of building, mutual loan and accumulating fund associations," and the acts amendatory thereof, to wit—chap. 564, passed June 9, 1875; chap. 96, passed April 1, 1878.

The purpose of the association is to make loans only to its members, and for the further purpose of accumulating a fund to be returned to its members who do not receive advances on their shares.

The management of the association is vested in a board of directors, who have power to make by-laws. There is a president and other officers and a standing committee. The latter passes on all applications for loans. Membership is obtained by holding five or more shares of the association and subscribing for membership, Shares are divided into three classes, instalment shares, paid-up shares and interest bearing paid-up shares. We are only directly concerned with the first class. They are described in the articles of the association as follows:

"SEC. 2. Instalment shares.—Instalment shares shall be issued in monthly series, and shall be dated the first business day of the month, and shall be due and become payable whenever the amount in the loan fund to the credit of such shares, consisting of monthly dues and profits apportioned to such shares, shall equal the face value of the shares."

It is provided, article 10, that dues on each instalment share shall be sixty cents per month until the maturity of the shares. There is also a provision for fines and forfeitures. The loan fund and loans are provided for as follows:

"SEC. 1. The loan fund of the association shall consist of fifty cents of the monthly dues paid in on each share, interest, premiums, fines and forfeitures, and the profits derived therefrom, and shall be loaned to members of the association by the board of directors upon approved applications for loans in the order in which they have been filed.

"SEC. 2. Interest at the rate of not more than six per cent per annum will be charged upon all loans, which interest must be paid monthly, with the monthly dues, on or before the last business day of each month, until the maturity of the pledged shares, and a premium of not more than fifty cents per month will be charged on each one hundred dollars borrowed, which premium must be paid on or before the last business day of the month, for a period of eight years, or until the maturity of the pledged shares, should they mature before the expiration of the eight years. The premium for the first six months to be paid in advance.

"SEC. 3. A member may pay such loan at any time after one year, on giving thirty days' notice in writing to the secretary, upon the payment of the amount borrowed, with interest and premium thereon, and a redemption fee of fifty cents per share. No redemption fee shall be charged on matured shares."

It is also provided that loans on real estate shall be secured by a first mortgage on the property offered for security, by promissory notes, bonds, mortgages and deeds of trusts of the applicant, or such other instruments as may be required, "and for every loan of $100 he shall, in addition thereto, transfer to the association at least one share thereof as collateral security."

In 1892 the plaintiff in error had an agent in the city of Meridian, Miss., who was authorized to receive applications for stock and loans, and to receive payment of dues, interest and premiums, and to transmit the applications and payments to plaintiff in error at its office in New York. The domicil of the plaintiff in error was and is New York. The defendant in error in 1892 was a citizen of the city of Meridian, and made application through the agent of plaintiff in error at Meridian for a loan of $2,500, and to subscribe for twenty-five shares of stock, as required by articles of plaintiff in error. The loan was granted by the executive committee under the terms and according to the conditions of the articles of association. Defendant in error made the following payments "as dues, interest, premium and fines on said stock and loan, to wit: Advance premium sent

the association at New York, $66.25; paid defendant's agent at Meridian, as shown by the receipt book hereto attached, $668.75, and $2,500 paid the association in New York by draft sent them on November 7, 1893, in full payment of said loan of May 21, 1892."

Defendant in error repaid this loan, but retained his twenty-five shares of stock, and paid his dues thereon for the months of December, 1893, to August, 1894, exclusive, amounting to the sum of $135.

In October, 1894, he withdrew five shares and received from plaintiff in error $73.90, the withdrawal value thereof.

In June, 1894, he made an application for another loan on his twenty shares, which was forwarded to plaintiff in error in New York by C. F. Woods, its agent. The loan was granted by the executive committee, and in consideration of the loan he executed to plaintiff in error a bond, assignment of shares and mortgage of real estate.

The loan was repaid by crediting thereon the sum of $649.70, the withdrawal value of his shares, payment by draft on New York of the sum of $1,473.96; interest, dues, fines and premiums, $868. Part of the latter was paid through the agent and part was sent directly to plaintiff in error.

The bond and mortgage given by defendant in error to secure the loan recited that they were given in consideration of such loan, and expressed as one of their conditions that defendant in error would repay the sum loaned to plaintiff in error "at its office in New York city, with interest for the same at the rate of six per cent per annum until paid, together with a monthly premium of ten dollars and no cents for eight years, or until the earlier maturity of said shares, should they mature before the expiration of the eight years, and in addition thereto the sum of twelve dollars and no cents for the monthly dues on the said twenty shares, which interest, premium and dues are payable monthly on or before the last business day of every month, at the office of the association in New York city, until the maturity of the said shares, except the said monthly premium, which is to be paid for eight years only, and also all fines which may be imposed by the said association for default in payment of said interest, premium or dues."

To the declaration of defendant in error, plaintiff in error filed the general issue, with notice thereunder that plaintiff in error would give in evidence and prove the facts substantially as above stated. Subsequently, April, 1901, and August, 1901, plaintiff in error made motions for leave to amend its notice under the general issue. The amendments claimed rights under the Fourteenth Amendment of the Constitution of the United States, also under section 10 of article 1 of that instrument, and under section 1, article 4.

Defendant in error moved to strike out the amendments on the ground that they were filed without leave of the court. The motion was granted.

Testimony was introduced and at its conclusion defendant in error asked the court to direct the jury to find for him the excess paid over six per cent on both loans. The instruction was refused. The court, on the contrary, instructed the jury, at the request of plaintiff in error, that the first loan was not usurious. But the court charged the jury that the second loan was usurious, and directed them to find for defendant in error the sum paid by him in excess of six per cent on the loan ($2,000), with interest at six per cent per annum from July, 1899, to date of trial.

Plaintiff in error asked the court to instruct the jury substantially as follows:

1. Defendant in error, as a borrowing shareholder, was entitled to and did share in the profits of the association, and the contract was, therefore, valid and not usurious.

2. The contracts were made and consummated in New York and performable there, and are to be construed by the laws of New York, and under those laws the contract is valid and not usurious.

3. Under the Fourteenth Amendment of the Constitution of the United States, defendant in error had a right to become a member and shareholder of the association, to be a borrower from it upon the terms and conditions of its articles, and make contracts with it performable in the State of New York, and reciprocally defendant in error had the right to make the loan, and entitled under said amendments to have the "contracts considered and their validity determined by the laws of the State of New York," where they were performable; and under section 1, article 4, of the Constitution of the United States, was entitled to have the court give full faith and credit in determining the validity of the contracts with defendant in error, to the public records and judicial proceedings of the State of New York, especially the laws under which the defendant in error was incorporated, and the acts amending the same, and the decision in the case of *Association* v. *Read*, (93 N. Y. 474,) and other decisions, which hold that the contracts are valid and not usurious under the laws of New York.

4. The contract is not usurious under the laws of Mississippi.

5. Section 2348 of the Annotated Code of Mississippi, as sought to be applied, impairs the obligation of the said contracts in violation of section 10, article 1, of the Constitution of the United States.

6. The decision of the Supreme Court of Mississippi in *Sukoloski* v. *New South B. L. Association*, (77 Miss. 155,) and the decisions following it having been rendered long after the making of said contracts, in so far as they define the public policy of Mississippi in regard to foreign building and loan associations, are tantamount to judicial legislation, and in violation of section 10, article 1, of the Constitution of the United States.

7. The evidence shows that both loans have been voluntarily paid and settled by defendant in error with full knowledge of all the facts.

8. As to the loan of 1894 the evidence shows that defendant in error, being a shareholder in the association, had a right to demand and receive advances or loans upon his shares upon the terms and conditions set out in the articles of the association, and the association was obliged to grant the same, and the said contract was made in pursuance of said right and application, and that the code of Mississippi does not govern said contract, and is as to said contract "both *ex post facto*, and impairing the obligation of said contract and in violation of sec. 10, art. 1, of the Constitution of the United States; and under sec. 1, art. 4, of said Constitution and the laws of New York and the Fourteenth Amendment to said Constitution the said contract of August 30, 1894, is valid and enforcible and not usurious."

The instruction was refused, and plaintiff in error excepted. The jury found for defendant in error for the sum of $677.96, being amount paid in excess of the loan, and for the sum of $93.79 interest. Judgment was entered upon the verdict. It was affirmed by the Supreme Court of the State, as we have said.

Mr. Justice McKenna, after stating the case, delivered the opinion of the Court.

It is objected that the Federal questions presented cannot be considered "because they were not raised in time and the proper way," and that the Supreme Court did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the State practice.

The Supreme Court considered that plaintiff in error, by the motions to amend the notice, attempted to "inject" a Federal question into the record, and that the instruction asked by the plaintiff in error had the same purpose. The court said: "It was another ingenious but unsuccessful effort to inject the Federal question into the record. If the court had allowed the amended notice and pleas to be filed, which presented nothing on the merits, but simply the alleged Federal question, then there would have been an issue involving the Federal question, to which an instruction would have been appropriate."

Upon the ruling of the court upon the amendments to the notice we are not called upon to express an opinion, but, we think, it is very clear that plaintiff in error was entitled to claim rights under the Constitution of the United States based upon the case as presented. And if the rights asserted actually existed plaintiff in error was entitled to an instruction directing a verdict in its favor. The claim was, therefore, made in time, (*Green Bay & M. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58; *Rothschild* v. *Knight*, 184 U. S. 334; *Meyer* v. *Richmond*, 172 U. S. 82; *Mullet* v. *North Carolina*, 181 U. S. 589; *Dewey* v. *Des Moines*, 173 U. S. 193.) It was also sufficient in form.

The Federal questions presented by the record are reducible to two, to wit: (1) That the decision of the Supreme Court of Mississippi was in effect an impairment of the contract between plaintiff in error and defendant in error. (2) That full faith and credit were not given to the public acts, records and judicial proceedings of the State of New York.

1. This contention is untenable. We said in *Bacon* v. *Texas,* (163 U. S. 207):

"Where the Federal question upon which the jurisdiction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, so as to give this court jurisdiction on a writ of error to a State court, by some subsequent statute of the State which has been upheld or effect given it by the State court. (*Lehigh Water Co.* v. *Easton,* 121 U. S. 388; *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18; *Central Land Co.* v. *Laidley,* 159 U. S. 103, 109.)"

In the case at bar there was no subsequent statute. There was a change in decision, it is contended, but against a change of decision merely section 10, article 1, cannot be invoked.

2. If the contract between plaintiff in error and defendant in error cannot be regarded as controlled by the law of New York, there is no foundation for the contention that full faith and credit were not given to the public acts and records of New York.

A similar question was presented in the case of *New York Life Insurance Company* v. *Cravens,* (178 U. S. 389.) The plaintiff in error in that case was a New York corporation, having its principal place of business in the State of New York. It maintained agents and examiners in the State of Missouri. One of these agents solicited Cravens, at his residence in Missouri, to insure his life in the company. Cravens assented, and made a written application for the policy sued on. The application was made part of the policy and contained the following provisions:

"That inasmuch as only the officers of the home office of the said company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in manner affect its rights, unless such statements, representations, promises or information be reduced to writing and presented to the officers of said company, at the home office, in this application.

"That the contract contained in such policy and in this application shall be construed according to the laws of the State of New York, the place of said contract being agreed to be the home office of said company in the city of New York."

Four annual premiums were paid in Missouri. The fifth was not paid. Cravens died, and proof thereof was duly made. A controversy arose between the widow of Cravens and the company as to the amount due on the policy. Applying the law of New York, the company contended that there was due only the sum of $2,670 of paid-up insurance, and tendered that amount. The widow contended, applying the law of Missouri, for $10,000, less the amount of unpaid premiums, which left a balance of $8,749.21, with interest at six per cent from the date of the death of Cravens, and suit was brought for that amount. She recovered judgment according to her claim, and the case was brought here.

Describing the contentions of the company, we said that they were reducible to one form, to wit, that the statute of Missouri had been made by the Supreme Court of Missouri the measure of the rights and obligations of the parties against the agreement of the parties that the contract should be considered as having been made in New York, and should be construed and interpreted according to the laws of that State. The Supreme Court of Missouri decided that the statute expressed a condition upon which the company, as a foreign corporation, was permitted to do business in the State, and also expressed the public policy of the State which parties could not by their contracts contravene. We accepted that interpretation of the statute and affirmed the judgment.

In the case at bar the Supreme Court of Mississippi gave the same effect to the statute of that State as the Supreme Court of Missouri gave to the Missouri statute. The court applied and followed the doctrine of *Shannon* v. *B. & L. Association*, (78 Miss. 955,) expressed as follows:

"It must be remembered that the State has the power to prescribe the terms on which foreign corporations may do business. It is declared in § 849 of the Code of 1892, last clause, 'such foreign corporations shall not do or commit any act in this State contrary to the laws or policy thereof, and shall not be allowed to recover on any contract made in violation of law or public policy.' This is the plain mandate of our law, which must be rigidly enforced by the courts. And the code otherwise provides that (§ 2348) domestic building and loan associations are excluded from the operation of the usury laws, but foreign building and loan associations are subject to them, and to enforce this public policy, thus declared by the statute, is not to give extra-territorial operation to our statutes. On the contrary this corporation has come into the State, localized its business here, through local boards scattered all over the State, and must submit such business thus localized to the operation of the laws of the State. To hold otherwise would operate the grossest injustice to our citizens, and would virtually abrogate our statutes against usury.' And again on p. 974: 'Foreign corporations wishing to do business with our citizens, and localizing that business within our State through local boards, must comply with the laws of this State. They cannot, under such circumstances, enforce here stipulations in contracts allowed by the law of the State which created them, if these stipulations violate our laws or

public policy. Such laws of such foreign States can have, *ex proprio vigore*, no extra-territorial effect, and it is not competent for a foreign corporation whose business has been localized in this State, or the borrower, or both, to abrogate by attempted contract stipulations whose purpose it is to evade our laws against usury—the laws of this State that subject.

"This holding in no way interferes with the right of a foreign corporation whose business has not been localized here to make contracts with borrowers, to be governed by the laws of the State of their domicile, if there be no purpose therein to evade the usury laws of the State. Such liberty of contracting, exercised in good faith, is not herein interfered with. The authorities cited to that point by counsel for appellee are not pertinent to cases like the one before us. All the cases are admirably collected in a note to *Bank of Newport* v. *Cook*, (46 Am. St. Rep. 171.) In that note the learned editor points out, on page 202, the distinction to be observed saying:

'"The proper answer to this argument is, that mere shams and evasions are not permitted to counteract and annul the law, and where it appears that the purpose of the parties in making the obligation payable in another State was to evade the laws against usury of the State in which it was executed, it will be regarded as infected with usury.'"

These remarks bring the case at bar within the ruling of *N. Y. Life Insurance Co.* v. *Cravens, supra.* The decision of the Supreme Court is, that plaintiff in error had become "localized" in the State, had accepted the laws of the State as a condition of doing business there, and could not, nor could defendant in error, "abrogate by attempted contract stipulations" those laws. See *Hancock, Mutual Life Ins. Co.* v. *Warren*, (181 U. S. 73.)

In *Chattanooga Building &c. Association* v. *Denison* (189 U. S. 408) we recognized the right of a State to impose conditions upon foreign corporations doing business in the State to the extent of holding the contracts of the corporation void which were entered into in violation of the conditions.

There is nothing inconsistent with these views in *Bedford* v. *Eastern B. & L. Association*, (181 U. S. 227.) In that case there was a consummated contract, and we held invalid a law enacted subsequently that made the enforcement of the contract depend upon the performance of onerous conditions. There was a question of usury in the case, but Tennessee, under the statute of which State usury was claimed, did not prohibit contracts which made the laws of another State applicable thereto. In that case, therefore, the law of the contract stipulated by the parties could be applied.

Judgment affirmed.

Mr. Justice WHITE took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.